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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO. 72-1083

ROBERT W. O'BRIEN,

Petitioner,

v.

FRANK FRANICH and JANE DOE FRANICH, husband and wife; WALT TUPPER and JANE DOE TUPPER, husband and wife; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; and RICHARD D. TURNER and JANE DOE TURNER, husband and wife,

Respondents

ROBERT W. O'BRIEN,

Petitioner,

v.

THE TRIBUNE PUBLISHING COMPANY, a Washington corporation; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; RICHARD D. TURNER and LINDA TURNER, husband and wife,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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INTRODUCTION

The petitioner, Robert W. O'Brien respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Washington, Division 2, entered in this proceeding on June 15, 1972; the order denying petitioner's petition for rehearing and modification entered by the Court of Appeals for the State of Washington, Division 2, dated July 25, 1972; and the order denying review by the Supreme Court of the State of Washington entered in this proceeding on November 8, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Washington, Division 2, (p. 47 infra) is reported at 7 Wn. App. 107. The order denying petition for rehearing and modification entered by the Court of Appeals of the State of Washington, Division 2, (p. 90 infra) is unreported. The order denying petition for review entered by the Supreme Court of the State of Washington (p. 92 infra) is reported at 81 Wn. 2d 1007. The memorandum opinion of the Pierce County Superior Court dated September 21, 1970 (p. 71 infra) is unreported and is set forth in Appendix C to this petition and as St. 3-8.[1]

[1] "Tr" refers to the Transcript of Record certified by the Pierce County Superior Court Clerk to the Court of Appeals of the State of

Washington, Division 2; "St" refers to the Statement of Facts certified by the Pierce County Superior Court Clerk to the Court of Appeals of the State of Washington, Division 2; "Dep" accompanied by name refers to original depositions certified and forwarded to the Court of Appeals of the State of Washington, Division 2.

JURISDICTION

The opinion of the Court of Appeals of the State of Washington, Division 2 (p. 47 infra, Appendix B) was entered on June 15, 1972. The order of the Supreme Court of the State of Washington denying Petition for Review was entered on November 8, 1972 (p. 92 infra, Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (c) because a title, right, privilege or immunity was claimed under the Constitution or statutes of the United States, which claim was sustained by the Court of Appeals, Division 2, and the Supreme Court of the State of Washington.

QUESTIONS PRESENTED

1. Whether, in a summary judgment proceeding in a defamation action it is a denial of due process of law as guaranteed by the Fourteenth Amendment for a state to truncate a single publication into defamatory and nondefamatory matter thereby preventing the plaintiff from presenting evidence at trial on all aspects of the publication to show that the total conduct of the defendants as it related to the whole publication evidenced malice as described in New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) and subsequent cases;

2. Whether the court's ruling as a matter of law that the common law qualified privilege of reporting on judicial proceedings was met, by a publication concerning a lawsuit in which only pleadings had been filed, deprived the plaintiff of due process

of law and if not, whether the court's refusal to allow a jury to determine whether that qualified privilege had been abused by the defendants under the circumstances deprived the plaintiff of a right to a trial by jury and as a result deprived him of due process of law;

3. Whether a state's summary dismissal of a conspiracy to publish a libel without allowing a trial and evidence to be presented on that issue deprived plaintiff of his right to a jury trial and due process of law;

4. Whether in a libelous publication involving matters of substantial public interest it is proper for a state to apply the same test of proof in a summary judgment proceeding in the state court for matters involving "stale news" in a political advertisement as is applied in a news matter involving "hot news".

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

STATEMENT OF THE CASE

These are consolidated cases in libel brought in a court of the State of Washington against Frank Franich and wife, his newspaper, the Puyallup Publishing Company; Anthony "Tony" Chase and wife; Richard D. Turner and wife, and the Tribune Publishing Company. The libelous publications consisted of an editorial and a political advertisement called the "Who is O'Brien" ad that were published in 1968 during the 6th U.S. Congressional District campaign between incumbent Congressman Floyd V. Hicks and unsuccessful challenger Anthony "Tony" Chase.

The trial court granted all defendants' motions for summary judgment and petitioner appealed that decision to the Court of Appeals of the State of Washington, Division 2. The Court of Appeals on June 15, 1972 affirmed in part; reversed

in part; and remanded for trial on limited issues. The affirmance portion of the decision affirmed the dismissal from the action of the defendants Franich and the Puyallup Publishing Company and decreed that only portions of the publications were libelous and limited evidence on the question of malice to facts giving rise to the publication of only a small part of the publication the court decreed to be defamatory as a matter of law.

A petition for rehearing and modification was denied by the same Court of Appeals, Division 2.

A Petition for Review was denied by the Washington State Supreme Court.

HOW FEDERAL QUESTION WAS RAISED

A. PIERCE COUNTY SUPERIOR COURT

All defendants in their answers raised the Federal Constitutional questions by submitting as a defense for the libelous publications the First Amendment Qualified Privilege to report false matters involving public figures and public officials in the absence of a showing of malice by the plaintiff (knowledge of falsity or reckless disregard for the truth or falsity). At the time of the pleadings and the summary judgment motions (1970) Rosenbloom v. Metromedia, Inc., 91 S. Ct. 1811, 29 L. Ed. 2d 686, 403 U.S. 29 (1971) had not been decided. The petitioner throughout has maintained, in effect, that in face of the evidence he presented at the summary judgment hearing to grant the defendants' motions for summary judgment would be

error and would deprive the petitioner of his right to trial by jury, his right to petition for the redress of his grievances and deprive him of property without due process of law.

B. THE COURT OF APPEALS, DIVISION 2

On the appeal from the trial court's granting of summary judgment dismissing petitioner's claims, the petitioner's opening brief, reply brief and statement of additional authorities contended that petitioner was being deprived of his right to a trial by jury and that the effect of the court's rulings which were in conflict with New York Times v. Sullivan and its progeny was to deprive the petitioner of property without due process of law.

In addition it is equally as important that the First Amendment freedoms be applied fairly and correctly to a plaintiff as well as to defendants in a First Amendment qualified privilege case involving freedom of the press and this was brought out to the Court of Appeals, Division 2.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS

A. The decision below insofar as it affirms the trial court ignores the rules set down by this court concerning summary judgments in First Amendment libel actions and therefore conflicts with New York Times v. Sullivan, supra, and Rosenbloom v. Metromedia, Inc., supra.

The record simply shows that the defendants Chase and Turner met with Hunt and Hampton during the same time they were instituting their lawsuits against the petitioner alleging that he had posed as an attorney and defrauded her of money and him of real property. During this time period Chase and Turner were also meeting

with defendant Franich and feeding him information about petitioner and the lawsuits for use in an editorial that Franich subsequently wrote. (T. Chase, Turner and Franich Deps and Tr. 131 (1)-169 (8)) Also during this same time, the spring and summer of 1968, Turner and Chase were feeding this information about the petitioner to Jack Anderson and Fred G. Blumenthal of the Drew Pearson - Jack Anderson staff. Franich wrote and published the editorial (appendix A) on October 23, 1968 and on that same day it was inserted into the Who is O'Brien political ad (appendix A) and sent to the typesetter. (Tr. 97-100) The ad had been prepared by Chase's political advertising agency at least ten days prior to publication of the editorial and was waiting for the editorial to be inserted in so it would be put into final form. (Tr. 101-103 (1))

Petitioner learned of the political ad, absent the editorial, on approximately October 13 or 14, 1968 and at a meeting with Chase on October 24, 1968 warned him it wasn't true and not to publish it. Chase claimed no knowledge, professing that it was a production of Democrats for Chase, a group over which he had no control. (O'Brien and Chase Deps. and Tr. 107-108) This was later shown to be untrue by Chase's own admission. (Chase, Turner, Ketner, Smith and Steel Deps.)

Petitioner also warned the Tribune Publishing Company not to publish anything about him regarding the Hunt and Hampton accusations at a meeting with John McGee "Jack Wilkens of the Tribune on October 30, 1968 when Wilkens and petitioner were discussing the Drew Pearson - Jack Anderson release which concerned a story about the Hunt and Hampton lawsuits and matters not in the lawsuits that were fed to Anderson

by Chase and Turner in the form of an affidavit from Hunt, with the signature torn out, that Chase and Turner had procured from Hunt in August of 1968. (Wilkens Dep. pp. 3-21, Tr. 110)

The decisions of this court commencing with Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) on through the latest pronouncement in Rosenbloom v. Metromedia, Inc. supra, have consistently enunciated the doctrine that the extent of the investigation necessary to avoid a showing of reckless disregard for truth or falsity (malice) is determined by whether the "news" is "hot news" or "stale news". The record in this case shows without contradiction that the matters that ultimately appeared in the Who is O'Brien ad were all old news, i.e., on July 9, 1968 the Tacoma News Tribune printed an article not only about

the Hunt and Hampton lawsuits against petitioner, but primarily about his counter claim against Hunt and his separate suit against both Hunt and Hampton alleging a political conspiracy to harm him, libel and abuse of the legal process. (Tr. 62) Franich was given that article by Chase. (Tr. 240) Chase and Turner got the affidavits from Hunt and Hampton in August of 1968. (Chase and Turner Deps. and Tr. 127-131) Chase and Turner fed this information to Jack Anderson in the summer of 1968 (Note - For some reason this Drew Pearson - Jack Anderson release regarding petitioner wasn't scheduled for release until November 3, 1968 - two days before the election.) The Who is O'Brien ad was completed except for the editorial in the early part of October, 1968. This evidence shows conclusively that the material in this ad was not "hot news". In fact, a portion of it, the "Hughes Letter Political

Ad" was derived from the 1966 political campaign.

The record further shows that none of these defendants did any investigation regarding the truth or falsity of the materials in the political ad or the editorial with the exception that supposedly an effort was made to determine the petitioner's salary and Turner reviewed the court file to see that the Hunt and Hampton lawsuits had been filed and Franich claims he called the County Clerk to ascertain if the Hunt and Hampton lawsuits had been filed. (Turner, Chase and Franich Deps.) Other than that, Chase and Turner talked only to the accusers Hunt and Hampton and apparently relied on their word alone, even after Hunt, in August, returned the affidavits with the signatures torn out, which surely is ample evidence of recklessness.

In Rosenbloom v. Metromedia, Inc.,

supra, at p. 1818 of S. Ct. Reporter, this court stated:

> In reversing, the Court of Appeals emphasized that the broadcasts concerned matters of public interest and that they involved "hot news" prepared under deadline pressure."

and footnote 12 at page 1820:

> "We also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business." (citations omitted)

That the Federal Appellate Courts and even the Supreme Court of the State of Washington has adopted the view that this court in Curtis Pub. Co. v. Butts, supra and Rosenbloom v. Metromedia, Inc., supra has indicated a closer scrutiny is necessary before entering summary judgment in a stale news case than in a "hot news" case is shown by the Washington Supreme Court case of Miller v. Argus Publishing Co., 79 Wn. 2d 816, ____ P. 2d ____(1971) pages 830 and 831, and the Federal Appellate Court decisions of Goldwater v. Ginzburg, 414 F.

2d 324 (2nd Cir. 1969) cert. den. 396 U.S. 1049, 90 S. Ct. 701, 25 L. Ed. 2d 274; Belli v. Orlando Daily Newspapers, Inc. 389 F. 2d 579 (2nd Cir. 1967) cert. den. 89 S. Ct. 88, 393 U.S. 825, 21 L. Ed. 2d 96; Time, Inc. v. Ragano, 427 F. 2d 219 (5th Cir. 1970); Wasserman v. Time, Inc., 424 F. 2d 920 (D.C. Cir. 1970); Vandenburg v. Newsweek, Inc., 441 F. 2d 378 (5th Cir. 1971); and Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421 (D.C. D.C. 1972).

Like Goldwater v. Ginzburg, supra, the facts of the case submitted by petitioner contained evidence of malice at least comparable, and we think in excess of that held sufficient in Curtis Publishing Co. v. Butts, supra, at page 339 of Goldwater v. Ginzburg, supra, the court states:

> "The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough

"investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; appellants were not psychiatric experts nor did they have any expert review 'Goldwater: The Man and the Menace' or evaluate its conclusions; they persisted in their polling project despite warnings by reputable professional organizations that their techniques lacked validity; and, obviously there was evidence as to whether there was a preconceived plan to attack Senator Goldwater regardless of the facts.[24]" (emphasis added)

The decision of the Court of Appeals, Division 2, in the case at bar is clearly in conflict with Goldwater v. Ginzburg, supra, as well as the rules laid down by this court in New York Times v. Sullivan, supra, and all subsequent cases.

The danger of the summary judgment procedure is clearly shown by another Federal Court of Appeals decision that the lower court's decision is in conflict with; Vandenburg v. Newsweek, Inc., supra, at page 380:

"The Supreme Court has held that actual malice may be inferred when the investigation for a story which is not 'hot news' was grossly inadequate in the circumstances. Curtis Publishing Co. v. Butts, supra, 388 U.S. at 156-158 87 S. Ct. 1975, 15 L. Ed. 2d 1094."

In short, all of the cited cases dictate that summary judgment was not proper in petitioner's case.

B. The decision below as it relates to the conspiracy allegation is in conflict with established law and with the Federal Court decision of Belli v. Orlando Daily Newspapers, Inc., supra.

The petitioner in his complaint against Franich and Chase and Turner alleged that Franich was part of a civil conspiracy to prepare and publish the editorial regarding the petitioner so that it could be inserted into the Who is O'Brien political ad. The court below

stated that no conspiracy had been proved and that in the absence of such a conspiracy to libel, there was a failure of proof of reckless disregard for truth or falsity by Franich. In effect, the court required greater proof regarding Franich than Turner and at the same time imputed petitioner's warning to Chase to Turner, also stating that Turner was the alter ego of Chase. The court erroneously accepted the defendants' evidence contrary to all rules regarding summary judgment even in a First Amendment Libel case. In short, the court erroneously required the same standard of proof to prove the conspiracy to libel as they required of petitioner to show reckless disregard for truth or falsity. Even if that standard does apply, which petitioner disputes, it was met under the evidence and it was error to award summary judgment dismissing Franich and his corporation, Puyallup Publishing Company from the action.

In Belli v. Orlando Daily Newspapers, Inc., supra, the Court of Appeals for the 2nd Circuit specifically ruled in concert with petitioner's rationale in a libel case which included an allegation of conspiracy to libel. At page 587 the court stated:

> "Belli charges a conspiracy among Orlando Daily Newspapers, Inc., the Evening Star Editor Martin Anderson, Jean Anderson, and other unnamed persons and corporations (but not Handley) to abuse, discredit and vilify Belli through publication of the libelous article. The district court dismissed the conspiracy count as being too vague and indefinite to state a claim upon which relief may be granted. This dismissal is in error in light of our holding on the alleged libel."

C. The decision below as it relates to the common law qualified privilege of reporting on judicial proceedings is in conflict with all established law and in particular the Federal Appellate Court Decision of Hurley v. Northwest Publication Inc., 398 F. 2d 346 (7th Cir. 1968)

In the case at bar the defendants relied upon the "common law" qualified privilege to publish statements about judicial proceedings to excuse them from writing about the pending lawsuits against petitioner brought by Hunt and Hampton when, in fact, these two lawsuits had not yet come to trial nor had any judicial action been taken upon them. It is apparent that the defendants, the trial court, and the Court of Appeals for Division 2 misinterpreted the "common law" rule regarding the defense of the qualified privilege to report on judicial proceedings. This rule is set out in 3 Restatement of the Law of Torts, §611, as follows:

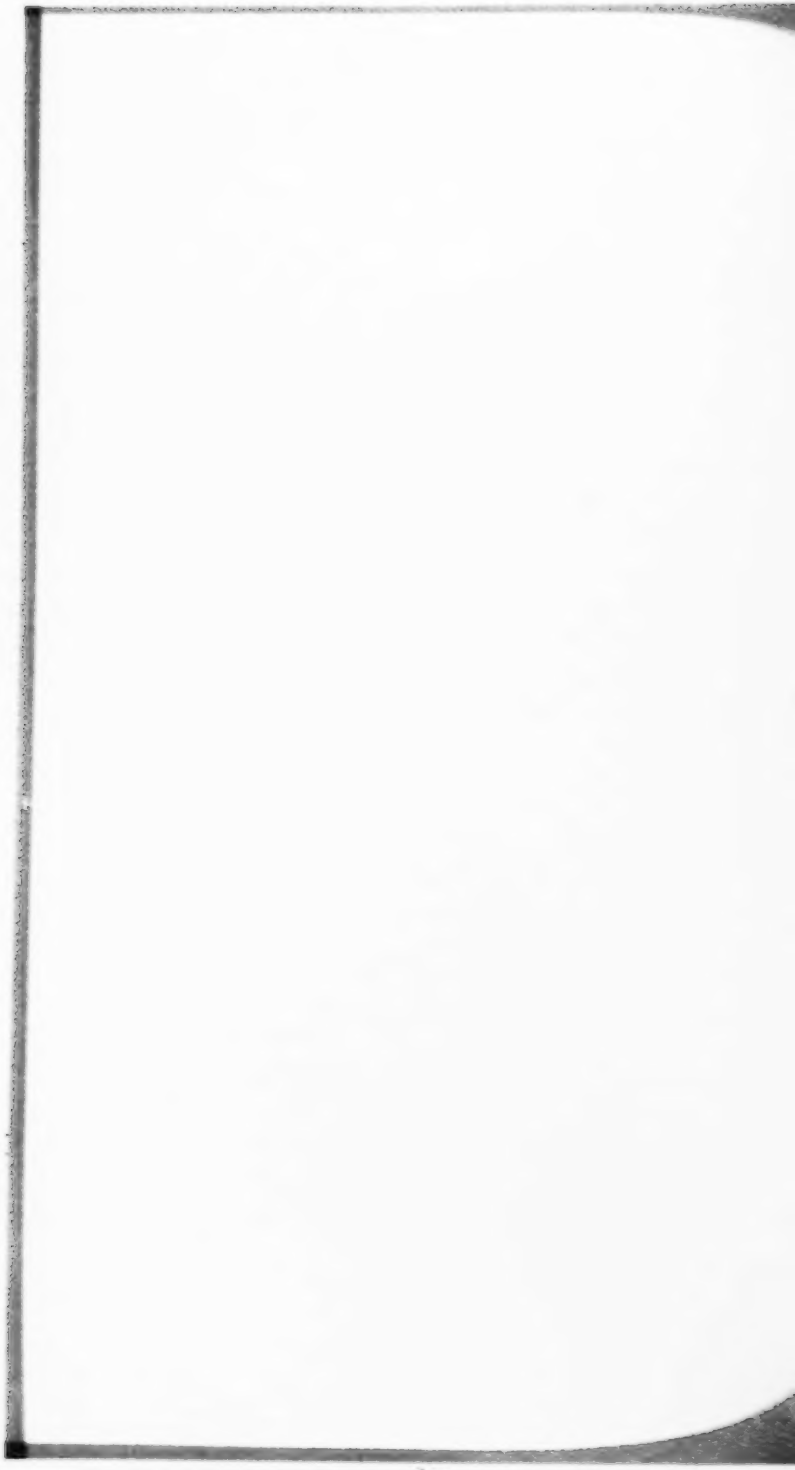
> "The publication of a report of judicial proceedings, or proceedings of the legislative or administrative body or an executive officer of the United States, a state or territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false or defamatory, if it is (a) accurate and complete

"or a fair abridgment of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed."

The first question is, what constitutes judicial proceedings? In the case at bar, there had been no judicial hearings on the cases of Hampton v. O'Brien and Hunt v. O'Brien, only the filing of pleadings. Under those circumstances the majority rule is as follows:

"Because of the opportunity afforded for malicious public defamation and even extortion, (see Nadelmann, the Newspaper Privilege and Extortion by Abuse of Legal Process, 1954, 54 Co. L. Rev. 359) through suits begun and promptly discontinued, most courts are agreed that some official action is essential to the privilege. Thus it is the prevailing view, with some few courts to the contrary (footnote 17), that a pleading (footnote 12) or a deposition (footnote 13) filed in a case but not yet acted upon may not be reported under the claim of privilege." Prosser, Law of Torts, Hornbrook Series 3d Ed. 1964, P. 817 and 818.

A complete review of this doctrine and



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the rationale behind it is found in 54 Col. L. Rev. 359 in an article written by Kurt H. Nadelmann, Lecturer in Law, New York University School of Law. On page 364 he states:

> "For some forty years more it remained the established rule that the publication of pleadings or other preliminary papers to which the attention of no judicial officer had been called and upon which no judicial action had been taken, was not within the privilege accorded to the publication of judicial proceedings, absent statutory modification of the common law. Enactments were passed in many states exempting newspapers from liability for a fair report of 'judicial proceedings' but they were held to state the common law rule." (emphasis added)

And at page 373 of that article, Professor Nadelmann points out that the American Law Institute prefers the majority rule:

> "In addition it is noteworthy that the American Law Institute has affirmed a preference for the old rule.
>
> A report of a judicial proceedings implies that some official action has been taken by the officer or body whose proceedings are thus

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"reported. The publication therefore, of the contents of preliminary pleadings such as Complaint or Petition, Bill in Chancery or Writ of Attachment, before any judicial action has been taken thereon, is not within the rule stated in this section. It is not necessary however that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that in the normal process of the proceedings, a final decision will be rendered. So too, the fact that the proceedings are ex parte rather than inter partes is immaterial if the matter has come official before the tribunal and action has been taken in reference thereto." Restatement Torts §611, comment c (1938) (emphasis added)

As a result, the majority rule would dictate that since there had been no official action in either of these two lawsuits against the petitioner at the time of the defendants' publication of their editorial and the Who is O'Brien political ad, there was absolutely no privilege for these defendants to write about them and Hunt's accusations became the defendants' accusations. Therefore, when the petitioner

subsequently won all of these lawsuits (which he did), the defendants found themselves accusing petitioner of the crimes of posing as an attorney and illegally collecting legal fees which is defamatory per se.

Conceding arguendo that the lower court properly adopted the minority view regarding what constitutes judicial proceedings thereby allowing the qualified privilege, we must still look to the qualifications of Restatement of Torts, §611. In that regard it is obvious that the libelous publications regarding the petitioner failed to meet either test (a) or (b) and it is necessary that both tests be met in order to avoid loss of the qualified privilege. Defendants' writings regarding the lawsuits were not accurate nor complete, nor was it a fair abridgment regarding those lawsuits. They failed to mention all of the petitioner's answers and denials, his counter-claims,

or indeed his separate suit for abuse of the legal process, political conspiracy and libel. The purpose of this publication was obviously to harm the petitioner and it is a jury question regarding the purpose and motivation. The recent federal case of Hurley v. Northwest Publication, Inc. 273 F. Supp. 967 (D.C. Minn. 1967) affirmed 398 F. (2d) 346 (7th Cir. 1968) analyzed this question and concluded at page 972:

> "(6,7) The qualified privilege accorded a publisher who accurately reports legal proceedings is lost if he is motivated by malice or acts from ulterior motives designed to injure."

There is no minority view regarding the interpretation of subsections A and B of Restatement of Torts §611. The Hurley decision, supra, represents the prevailing and only view, though not the only case, on the subject. This court in Rosenbloom v. Metromedia, Inc., at page 1817 of the Supreme Court Reporter refers to

Restatement of Torts §611 albeit the reference is dicta and not dispositive of the case. However, it would appear that it is time that this question be laid to rest and that the common law qualified privilege be put in its proper perspective. Other federal court decisions adopting the view enunciated by petitioner are Curtis Publishing Co. v. Vaughn, 278 F. (2d) 23 (D.C. Cir 1960) at page 25:

> "A publication, to be privileged as a report of official proceedings, must be full and accurate or immunity is lost, and if the report is garbled or fragmentary to a point where a false imputation is made by defendant about the plaintiff, defendant is subject to liability." (emphasis added)

and McGovern v. Martz, 182 F. Supp. 343 (D.C.D.C. 1960) at page 349:

> "Moreover, it is essential to the privilege, claimed by the defendants that their republication was a fair and accurate one. It is undisputed that only a portion of the House Report was set forth in the newsletter and also that defendants commented on the report. Whether the privilege is thus available at all is also in dispute."

It is noteworthy that even those cases that have allowed the minority rule as regards what constitutes judicial proceedings do not take the next step and convert it into an absolute privilege and deprive the plaintiff of a jury determination concerning the completeness of the report and the motivation behind it. In that regard, the Court's attention is invited to Johnson v. Johnson Publishing Co., 271 A. (2d) 696 (D.C. Cir. 1970) at page 699:

> "We therefore follow the minority view that a qualified privilege extends to reports of charges contained in pleadings filed in court.
>
> Our holding that the publication here in question is libelous per se leaves for the jury the questions of whether the publication is true or, if not true, whether, absent proof of malice, it is privileged in law as a fair and substantially accurate repetition of the allegations of the complaint."

The obvious effect of the lower court's ruling was to deprive the petitioner of his right to a jury trial on this issue of abuse

of the qualified privilege, if the privilege applies at all, and, consequently, is a deprivation of due process of law as regards the petitioner and is a taking of his property without due process of law.

D. The decision below conflicts with all libel decisions of this court in that it truncates the publications into libelous and non-libelous portions depriving petitioner of a fair trial and due process of law by preventing petitioner from presenting evidence of malice concerning the preparation and publication of the total publications.

All prior decisions of this court and the Federal Court of Appeals since New York Times v. Sullivan, supra, have allowed a plaintiff to present evidence of the total conduct of a libeling defendant in order to determine whether or not adequate proof of

malice had been presented. Indeed, this circumstantial evidence of conduct is the only manner of proving malice, as rarely will a defendant admit to publishing with knowledge of falsity and the term "reckless disregard for truth or falsity" can only connotate evidence of conduct and actions. The most classic example of course is this Court's decision in Curtis Publishing Co. v. Butts, supra, where the specific acts of the defendants were put into evidence and were relied upon as sufficient to show reckless disregard for truth or falsity. As in all libelous publications, there were some innocuous portions of the article about Butts, yet none of the courts that looked at that publication even considered truncating it into actionable and non-actionable parts. It must be read as a whole.

The net effect of the lower court's ruling here, however, was to so severely

limit admissible evidence to the extent that a showing of reckless disregard for truth or falsity regarding all defendants will be well nigh impossible. A quote from Goldwater v. Ginzburg, supra, at page 337 shows the importance and necessity of being able to put into evidence the totality of a defendant's conduct to meet the severe constitutional burden of proof under which a libeled plaintiff operates:

> "As can be seen, appellee and the district judge did not rely on a few isolated instances of derogatory statements which could be charitably thought of as being non-actionable negligent or good faith misstatements of fact, but rather upon the totality of appellants' conduct, as evidenced by the proffered materials, from which a jury might reasonably find a predetermined and preconceived plan to malign the Senator's character. The fact that appellants' supporting affidavit denied that the 'Goldwater issue' had been published with actual malice does not require that their motion for summary judgment be granted, expecially in light of appellee's countering materials. St. Amant v. Thompson, 390 U.S. 727 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

"Citation of course for most of the statements about Senator Goldwater in part I of the 'Goldwater issue' and the accurate reprinting in part II of most of the original responses of psychiatrists to the FACT questionnaire, does not, as appellants appear to claim, insulate appellants from responsibility for any of the false statements they made.

. . .

"Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. St. Amant v. Thompson, supra, at 732, 88 S. Ct. 1323. Furthermore, in our case, Ginzburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context. Also, if Ginzburg's 'melding' and 'distillation' of letters resulting in misplaced emphasis, or exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his own misstatements.

"Viewing the submittal materials and the inferences which might be drawn from them 'in the light most favorable to the party opposing the motion,' United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee. 414 F. 2d at page 337 (emphasis added)

II

THE PUBLIC IMPORTANCE OF THE ISSUES PRESENTED

It is obvious that this Court when it set forth the Constitutional privilege concerning proof of malice in New York Times, Inc., v. Sullivan, supra, knew that it would require more cases before the law became settled under the new guidelines. Petitioner has no problem in understanding the rationale behind the New York Times v. Sullivan, supra, rule and even can agree with the need for

such a protection in order for a free press to survive and be vigorous. In addition, from a reading and analysis of the decisions from the Federal Appellate Courts cited herein it appears that most of these courts fully understand and have implemented the guidelines set down since 1964. However, this is not to say that the states have and that all Federal Appellate courts have. Since it is a doctrine that has its greatest effect on state libel laws, as most libel actions originate in state courts, it is extremely important that the guidelines be understood and applied uniformly. Immediately after the New York Times doctrine was handed down, there was a tendency for all courts to grant summary judgments. However, soon two things began to happen; namely, the plaintiffs became more familiar with their burden under the new doctrine and

how to meet it, and secondly, the courts began to recognize that this Court was saying very clearly that you can prove malice by circumstantial evidence; indeed, that's probably the only way, but you had better gather your proof through discovery because summary judgment is a usable vehicle so long as care is exercised in its use and the rules regarding granting summary judgments are not abused.

It is consequently easy to see the trend in the recent Federal Appeals Court decisions away from indiscriminate granting of summary judgment; i.e., Goldwater v. Ginzburg, supra; Belli v. Orlando Daily Newspapers, Inc., supra; and Vandenburg v. Newsweek, Inc, supra. And this court has not accepted a libel case for review since Rosenbloom v. Metromedia, Inc., supra, to petitioner's knowledge.

However, the petitioner's case cries out for review by this Court. The state

courts are still misinterpreting this Court's guidelines and justice is being denied the victims of defamatory writings both by the State Courts and the prohibitive costs of appeal. We urge this court to clarify these guidelines in order that plaintiffs and defendants alike can obtain uniform treatment whenever they are involved in a First Amendment libel case. Unless this is done the same inconsistency will prevail for many years to come to the particular detriment of all defamed plaintiffs even though they are damaged by the libel and forge ahead and meet the severe burden of proof. The net effect is to deprive plaintiffs of due process of law by restricting or concealing pertinent matters that should be presented to the trier of fact.

Guidelines must be set down delineating the effect of the qualified privilege to report on judicial proceedings in a

First Amendment libel case. It is time for this Court to pronounce what constitutes judicial proceedings within the framework of Restatement of Torts §611. The case law is in conflict and only this Court can and should resolve that conflict.

The lower court has instituted a novel approach of truncating a libelous publication. This is something that has never been done before. It has a drastic effect on all plaintiffs in libel actions and this Court should review and resolve that this should never be done as it strikes at the heart of the rule regarding the reading of a libelous publication.

And the role of conspiracy to libel in a First Amendment libel case should be resolved as the lower court's ruling strikes at the long accepted rule that any role in the publication of a libelous publication, no matter how small in its

application is actionable.

In short, the decision below, if permitted to stand, completely subverts what this court has sought to accomplish since 1964 and would, insofar as the State of Washington is concerned, once again throw this area of the law into a turmoil.

CONCLUSION

For the reasons stated above, the decision of the lower court raises serious constitutional questions in view of holdings of this Court in the area of freedom of press and the law of libel as it affects state laws. Certiorari should be granted and that portion of the lower court's ruling that affirmed the trial court's summary judgment of dismissal should be refersed.

Respectfully submitted,

ARGAL D. OBERQUELL
of OBERQUELL AND AHLF
Attorney for Petitioner

February 2, 1973.

FILE COPY

FEB 5 1973

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO. 72-1083

ROBERT W. O'BRIEN,

Petitioner,

v

FRANK FRANICH and JANE DOE FRANICH, husband and wife; WALT TUPPER and JANE DOE TUPPER, husband and wife; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; and RICHARD D. TURNER and JANE DOE TURNER, husband and wife.

Respondents

ROBERT W. O'BRIEN,

Petitioner,

v

THE TRIBUNE PUBLISHING COMPANY, a Washington corporation; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; RICHARD D. TURNER and LINDA TURNER, husband and wife,

Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Argal D. Oberquell
Attorney for Petitioner
4515 Lacey Boulevard
Lacey, Washington 98503

February 2, 1973

APPENDIX A

THE DEFAMATORY PUBLICATIONS

WHO IS O'BRIEN Political Advertisement 45

Franich Editorial 46

Why is HICKS paying this man nearly $20,000 a year of your taxpayer's

MONEY??

The Facts:

From April, 1967, to December 31, 1967—Congressman Floyd Hicks paid a Tacoma resident, Robert W. O'Brien, a salary of over $500 per month. During this same time, O'Brien worked in the office of a local attorney while living in Tacoma the year around.

Who is O'Brien? If he was a "district representative," why didn't we ever see him? How could he possibly hold down a clerk's job and still be worth over $500 per month of the taxpayer's money? Why is this man being sued right now by two different parties for allegedly representing himself to be a lawyer when he is not? (Pierce County Cause Numbers 181883 and 181730).

On January 1 of this year, Congressman Hicks increased O'Brien's salary to over $1,500 per month or nearly $20,000 per year. For what? Why is this man O'Brien, who was worth over $500 per month yesterday for doing nothing, suddenly worth $20,000 of your taxpayer's money just because it's an election year?

There is something wrong about this relationship, and the voters of the Sixth District deserve answers. It's your money. He's your Representative.

Pierce County Herald and Puyallup Valley Tribune reprint of the October 23, 1968 front page editorial by publisher Frona Franich—

Maggie's Different, But . . .

Hicks' Campaign Costly To Taxpayers . . ."

Editorial

Appendix A

Maggie's Different, But....

Hicks' Campaign Costly To Taxpayers.....

When Seattle Times reporter William W. Prochnau, Washington D.C. Bureau Chief, wrote in the Sunday, Oct. 6 issue that the election expense line was a joke, he wasn't kidding.

Prochnau brought to light the fact that incumbent senators and congressmen often use public paid personnel for campaign work. He points out 6th District Congressman Floyd Hicks as one who "has James Haines on the staff [illegible] as well as a full-time government paid "district" aide who devotes nearly, if not all, of his time to political campaigning."

Prochnau further, reports that Hicks' two aides each on the government payroll of around $20,000 per year [illegible] have been left on the payroll during the campaign. The records show one of Hicks' aides, Steve O'Brien, had another [illegible] private industry job [illegible] while still on Hicks' payroll. On top of [illegible] in Tacoma all year long.

[illegible] Thor Tollefson in 1974, Hicks used [illegible] point of attack the fact that Tollefson's [illegible] government payroll.

[illegible] to Seattle Times writer Prochnau's [illegible], Sen. Magnuson, however, has taken [illegible] of his top [illegible] off the government payroll this fall. The [illegible] top assistant [illegible], a $35,000 [illegible], as Hicks' [illegible], a $16,000 aide, [illegible] "I'm going to be [illegible] final."

[illegible] this out as a result of fact that [illegible] public records [illegible] campaign, [illegible] information [illegible] that Hicks' aide [illegible], while still on [illegible] payroll, was [illegible] private enterprise [illegible] in fact has no [illegible] pending against him [illegible] elaborately represented [illegible] as an attorney [illegible] when in fact he [illegible]

[illegible] lawsuit [illegible] which were reported in [illegible] issue of the Tacoma News Tribune, have [illegible] by the [illegible] Hicks' replacement [illegible] and [illegible] the several charges.

The name Hicks and [illegible] center of controversy during the 1968 [illegible] when, according to a public letter written by Mr. [illegible] brothers of Bremerton and printed in several [illegible] daily newspapers, that Mr. O'Brien, threatened [illegible] and her husband when they replaced a Hicks [illegible] from their property in Tacoma their place of business with a sign for [illegible] Hatcher.

In the letter, Mrs. [illegible] wrote, "Mr. Robert O'Brien, who is Mr. Hicks' administrative assistant and is paid by our tax dollars, came into our store with another representative of Mr. Hicks. He proceeded to talk to me in a very rough manner concerning the removal of the Hicks sign. When I explained to him that my husband was at the present time in Washington D.C. on business concerning a government contract we have, he threatened me to this extent: He stated to me that we had a government contract, indicating that ours would be terminated. Also, he said we would be very sorry for the charge of signs and that he was going to the nearest phone immediately and phone Washington D.C. and make sure that my husband would be most unwelcome in Hicks' office from this time on."

We question the use of government paid personnel for campaigning purposes. We applaud Sen. Magnuson for his integrity in this matter, but question even more strongly the [illegible] methods used by Congressman Hicks.

APPENDIX B

OPINION BELOW

Decision of Court of Appeals
Division 2, State of
Washington 48

that anyone other than Premier assembled the saddles to the bar in question.

Judgment is affirmed.

MUNSON, C.J., and EVANS, J., concur.

[No. 381-2. Division Two. June 15, 1972.]

ROBERT W. O'BRIEN, *Appellant*, v. THE TRIBUNE PUBLISHING COMPANY *et al.*, *Respondents*.

[1] **Judgment — Summary Judgment — When Available — In General.** The ultimate question in a summary judgment proceeding is whether, resolving all factual doubts against the nonmoving party, a genuine issue of fact survives the pleadings, affidavits, and the documentary and depositional evidence.

[2] **Libel and Slander—Event of Public Concern—Burden of Proof.** A person subjected to a defamatory falsehood relating to his involvement in an event of public or general concern can recover for defamation only if he shows by clear and convincing proof that the statement was published with knowledge of its falsity or with reckless disregard of whether it was false or not. The court is to carefully review the record to ascertain whether there is substantial evidence of the required malice.

[3] **Libel and Slander—Reckless Falsity—Determination—Review.** A trial court's finding regarding malice in the mind of a person allegedly defaming one involved in an event of public or general concern involves "constitutional facts" and requires de novo review by an appellate court.

[4] **Libel and Slander—Showing of Malice—Summary Judgment.** When ruling on a defendant's motion for summary judgment in an action against him for defamation by a person involved in an event of public or general concern, the trial court must determine whether substantial evidence has been presented which, if believed, could persuade a jury with convincing clarity that the defendant was guilty of maliciously making the libelous statement.

[5] **Judgment—Summary Judgment—Averment of Specific Facts—Necessity.** A party moving for a summary judgment has the burden of showing no genuine issue of material fact exists; once this has been done by appropriate affidavits and discovery procedures, the other party may not rely upon his pleadings unsupported by evidentiary facts.

[6] Libel and Slander—Reporting Legal Proceedings—Privilege—Time Privilege Attaches. A newspaper has a qualified or conditional privilege to report legal proceedings provided the publication is a fair and accurate statement of the contents and is made without malice. The privilege attaches at the time the pleadings are filed and is not contingent upon judicial action being taken in the case.

[7] Libel and Slander—Reckless Falsity—Clear and Convincing Proof —In General. Reckless disregard for truth or falsity for purposes of a defamation action involves proof by clear and convincing evidence that the person making the statement entertained serious doubts as to its nature. A clear warning of falsity would constitute an objective manifestation leading to such serious doubt.

Appeal from a judgment of the Superior Court for Pierce County, Nos. 190355, 193589, Oluf Johnsen, J., entered October 13, 1970. *Affirmed in part; reversed in part; remanded.*

Consolidated actions for defamation. Plaintiff appeals from a summary judgment in favor of the defendants.

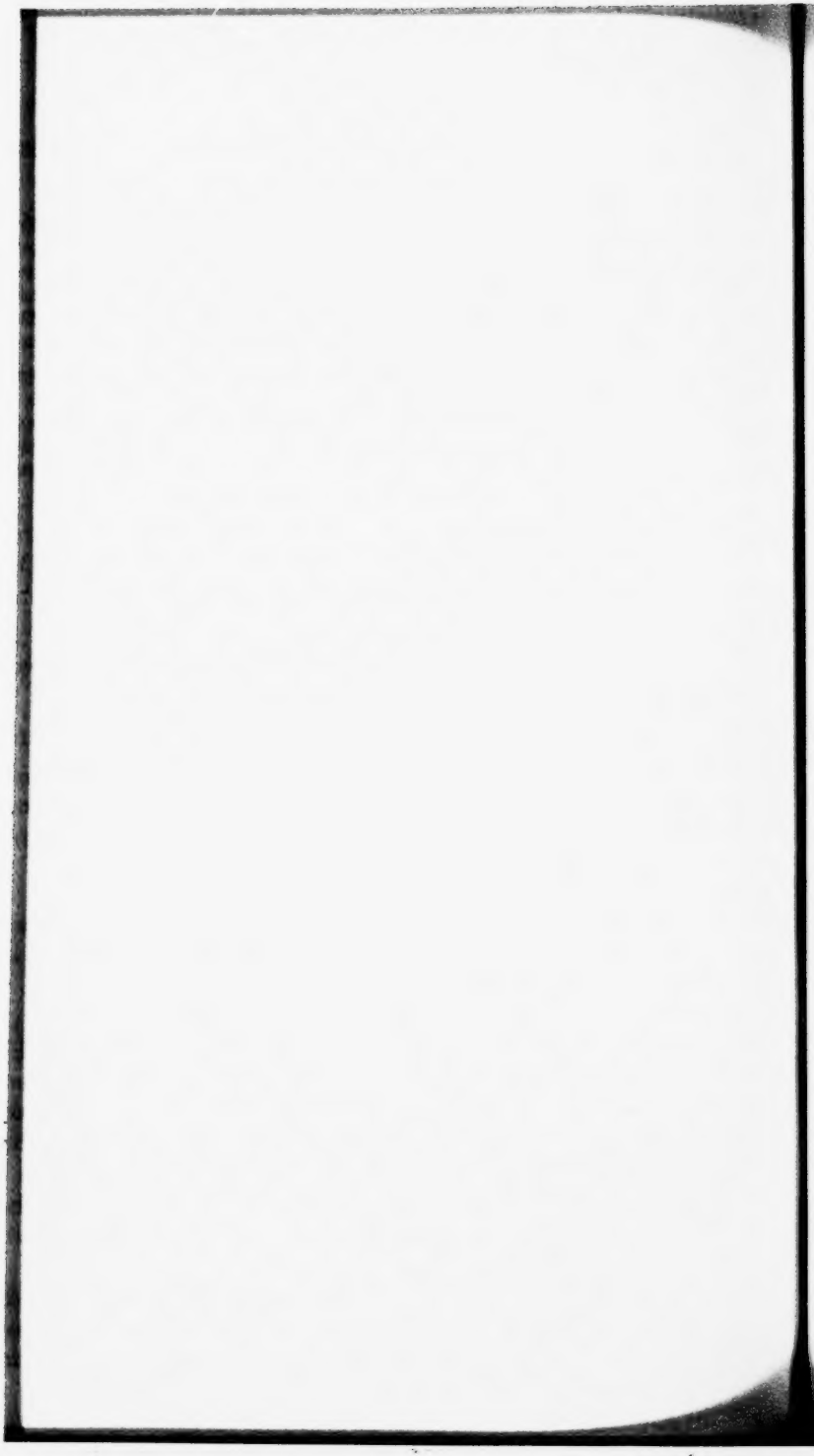
Argal D. Oberquell (of *Oberquell & Ahlf*), for appellant.

Robert Ratcliffe, Patrick C. Comfort (of *Comfort, Dolack, Hansler & Billett*), and *Valen H. Honeywell* (of *Gordon, Thomas, Honeywell, Malanca, Peterson, O'Hern & Johnson*), for respondents.

ARMSTRONG, J.—This is an appeal from two consolidated libel suits in which summary judgment was granted in favor of the defendants.

[1] The appeal centers upon a determination of whether certain alleged defamatory statements made by defendants concerned an event of public or general interest, and if so, whether plaintiff is entitled to a jury trial on the issue of malice. The ultimate question is whether, resolving all factual doubts against the nonmoving party in a summary judgment, a genuine issue of fact survived the pleadings, affidavits, documentary and depositional evidence.

The plaintiff, Robert W. O'Brien, was the former administrative assistant to Congressman Floyd Hicks, and claims to have been the target of libelous statements published in



The Tacoma News Tribune, Puyallup Valley Tribune and Pierce County Herald at the time of the 1968 political campaign. In that campaign incumbent Congressman Hicks was opposed by Anthony Chase, one of the defendants. The Tacoma News Tribune publication consisted of a political advertisement over the banner of "Democrats for Chase." This ad contained a copy of an editorial which had appeared in the Pierce County Herald and Puyallup Valley Tribune—both papers operate under a single management and they are, in practical effect, one newspaper. Defendant Franich wrote the editorial. The advertisement is set forth as appendix A and the editorial is set forth as appendix B.

The alleged libelous matter complained of revolves around four major charges made against plaintiff: (1) he received a part-time salary of over $500 per month as a district aide while engaged in other part-time employment, and thereafter received nearly $20,000 per year as a full-time district aide to Congressman Hicks while engaged in campaign work; (2) reference was made to two lawsuits filed against plaintiff which alleged that he falsely represented himself as an attorney, when in fact he was not; (3) O'Brien had sought and obtained a continuance of the lawsuit until after the election to avoid embarrassing his employer—he contends the editorial implies he improperly influenced the court; (4) a letter used in a campaign 2 years before was again used in the editorial and political advertisement—the letter stated that O'Brien threatened a Mrs. Hughes with termination of a government contract because she and her husband removed a Hicks sign from their place of business and replaced it with a sign of Congressman Hicks' opponent.

We find that items 1, 2 and 3 do not present genuine issues of material fact, but we find that the Hughes letter does present a genuine issue of material fact as to whether it is a defamatory falsehood and as to whether the letter was published by the defendants Chase, Turner and The Tribune Publishing Company with "actual malice."

The record shows that O'Brien had worked for Hicks as his administrative assistant, later had worked only part-time as a district aide in Hicks' district, but beginning early in 1968 had become a full-time district aide at an annual salary of between $18,600 and $19,353 per year. During that time he was working in Pierce and Kitsap counties, performing those many functions which a district aide to a congressman is expected to perform, including the maintenance of good public relations with an eye on the coming political campaign. Hicks was challenged by Chase and as a result battle lines were drawn for the political contest. Chase and one of his lieutenants, Richard Turner, also a defendant, were understandably seeking to find any flaw in Hicks' conduct of his political office and they seized upon O'Brien as one of Hicks' weaknesses. On several occasions they talked to defendant Frank Franich who wrote editorials for the Pierce County Herald. Chase gave Franich a brochure on his candidacy and photostatic copies of clippings relating to Congressman Hicks and O'Brien. At a later date Franich wrote an editorial which had Hicks for its principal target, but which, incidentally, discredited O'Brien. Chase and Turner then used this editorial in the political advertisement in The Tacoma News Tribune.

Defendants Turner and Chase denied any malice toward Mr. O'Brien and further denied any malice relating to the accumulation of materials transmitted to defendant Franich or The Tacoma News Tribune. Defendants Franich and The Tribune Publishing Company also specifically denied malice.

Defendants Turner and Chase have stated that they both felt, based upon investigation undertaken, that the content of the information contained in the editorial, and ultimately the political advertisement in its entirety, was true to the best of their knowledge.

On the basis of *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) the trial court concluded that plaintiff occupied a public figure status and that O'Brien had not presented a material issue of "actual malice" which would justify submitting the case to a jury.

The *New York Times* case involved a libel suit by an Alabama public official against The New York Times publishers and several members of civil rights groups for the publishing of an editorial-type advertisement by The Times. The jury awarded plaintiff damages against all the defendants and the judgment on the verdict was affirmed by the Supreme Court of Alabama on the grounds that the statements in the advertisement were libelous per se, false and not privileged, and that the evidence showed malice on the part of the newspaper. The defendants' constitutional objections were rejected by the Alabama court on the ground that the first amendment to the United States Constitution does not protect libelous publications. The decision of the Alabama court was based upon the then existing majority rule relating to libel actions.

The Supreme Court of the United States reversed the Supreme Court of Alabama on the basis that its holding infringed upon the safeguards provided by the First Amendment for freedoms of speech and press, made applicable to the states by the Fourteenth Amendment. In doing so, the court promulgated the now famous *New York Times* rule:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80.

In subsequent cases the court expanded the concept of "public officials" to "public figures" in the combined opinion of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967).

The latest expression in the constitutional aspects of the evolving law of libel is contained in *Rosenbloom v. Metromedia*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971). This was published after the trial court rendered its opin-

ion in the instant case. In *Miller v. Argus Publishing Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971) the court analyzed the *Rosenbloom* case at it applied to the facts and issues before it. At page 825 the Washington Supreme Court stated:

> In *Rosenbloom*, a majority of the Supreme Court has, in effect, abolished the "public official"—"public figure" test of *New York Times, Inc. v. Sullivan, supra*; *Curtis Publishing Co. v. Butts, supra*; and *Associated Press v. Walker, supra*. Although the lead opinion in *Rosenbloom* is signed by only three Justices, it is observed by Justice White in his concurring opinion that two additional Justices would go even further than does the lead opinion in protecting the news media from damage actions for their defamatory falsehoods. *Thus, we may look to the expressions in the lead opinion as constituting the principles to which we should adhere.*

(Footnotes omitted. Italics ours.)

[2, 3] After discussing the constitutional issues and prior holdings in *New York Times* and its progeny, the *Rosenbloom* court, 403 U.S. at 44 stated:

> It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, The System of Freedom of Expression 531-532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases.

The shift from the "public figure" concept of prior cases is illustrated by the observation in the lead opinion of *Rosenbloom*:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved.

> The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

(Footnote omitted.)[1] 403 U.S. at 43.

In analyzing the changes in libel law wrought by the recent federal cases the Washington Supreme Court stated at pages 826 and 827 of *Miller v. Argus Publishing Co.*, *supra*:

> The disastrous effect of heavy damage judgments in libel actions, both as a financial reality and as a prospect inducing "self-censorship," is regarded as a dangerous constriction on the robust exercise of a free press. *See Time, Inc. v. Hill*, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967).
>
> The focus of *New York Times* through *Rosenbloom* has been upon the balance (or "tension") between the individual's financial interest in his reputation and the constitutional guaranties of free press. *See Rosenblatt v. Baer*, 383 U.S. 75, 86, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966). It is now clear that these cases hold the interests of the press weigh much more heavily in this balance. A plaintiff's judgment for libel damages against the news media
>
> > for a defamatory falsehood . . . relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.
> >
> > *Rosenbloom*, 403 U.S. at 52.

Not only does *Rosenbloom* change the test from public

---

[1] In a concurring opinion, Mr. Justice White discussed constitutional restrictions on state defamation laws and stated that at least five members of the court would support each of the following rules:

> For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.

403 U.S. at 59.

figures to matters of public or general concern, it also presents a strong mandate to the trial court to carefully review the record to ascertain whether there is substantial evidence of "actual malice" as defined in *Rosenbloom* and cases cited therein. The lead opinion held that First Amendment questions of "constitutional fact" compel de novo review by the court.

[4] Prior to *Rosenbloom*, the Court of Appeals, in an opinion written by Judge Utter, considered the constitutional limitations on state libel actions in *Tait v. KING Broadcasting Co.*, 1 Wn. App. 250, 460 P.2d 307 (1969). Although the test has now shifted from "public figure" to matters of public or general concern, the analysis of the role of summary judgment in a libel action is clearly stated at pages 254 and 255 of that case:

> Is a motion for summary judgment proper to dispose of the issue of "actual malice" in a libel action?
>
> The focus of inquiry is directed to establishing the state of the defendant's mind. This evidence is generally derived from his conduct and other circumstances from which an inference may be drawn that he must have known the statement was either false or was made with a reckless disregard of whether it was false or not.
>
> The determination of "reckless disregard" has been recognized as essentially a factual one to be applied on a "case-by-case" adjudication. *St. Amant v. Thompson*, 390 U.S. 727, 730, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968).
>
> In reflecting on these problems in a libel case, doubt has been expressed whether questions dealing with state of mind should be decided by any other process than a jury determination. *Goldwater v. Ginzburg*, 261 F. Supp. 784, 788 (S.D. N.Y. 1966).
>
> Our court has been conservative in granting summary judgment where the issues involve the inferences to be drawn from admitted facts to determine ultimate facts such as intent, knowledge, good faith and negligence. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). These issues do not normally involve, however, the pursuit of constitutionally protected practices.
>
> Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are

raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms. *Dombrowski v. Pfister*, 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1964), *Time, Inc. v. McLaney*, 406 F. 2d 565, 566 (5th Cir. 1969).

It would seem to us these considerations are of sufficient concern to compel the court to carefully review the record in motions for summary judgment in libel cases involving the exercise of First Amendment guarantees and, at that stage, determine whether there is substantial evidence presented which, if believed, could persuade a jury with convincing clarity the defendant was guilty of maliciously making a libelous statement.

The *Tait* opinion is consistent with *New York Times v. Sullivan*, *supra*, and *St. Amant v. Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968). With respect to judicial review of facts relating to constitutional standards it anticipated the ruling in *Rosenbloom v. Metromedia*, *supra*. Because the *Tait* case so clearly analyzes the role of summary judgment on the issue of "actual malice" in a libel action, we adopt the quoted portion as a part of our holding in this case.

[5] In motions for summary judgment the moving party has the burden of showing no genuine issue of material fact. Once this has been done by appropriate affidavits and discovery procedures, the other party may not rely upon his pleadings unsupported by evidentiary facts. *W. G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 438 P.2d 867 (1968); *Reed v. Streib*, 65 Wn.2d 700, 399 P.2d 338 (1965).

With this review of the existing law in mind, we turn now to an analysis of the alleged libelous matter contained in the political advertisement set forth as appendix A and the editorial set forth as appendix B. Plaintiff contends that in four separate aspects the editorial and the advertisement presented genuine issues of material fact which should have been presented to a jury for determination. He argues that viewing the evidence in a light most favorable to him he had established actual malice with the convincing clarity which the constitutional standards demand.

We do not agree with plaintiff as to the first three of the contentions, but we do agree that there was a question of fact on the issue of the Hughes letter as to certain defendants.

O'Brien first contends that actual malice was established in the editorial because it implies that O'Brien received around $20,000 per year while he devoted much, if not most, of his time to campaigning. The editorial states that while on the Hicks' payroll, in the prior year, he had another job "with private industry." The explanation entitled "The Facts", contained in the advertisement in The Tacoma News Tribune, refers to his receiving over $500 per month while he held down a clerk's job.

The O'Brien deposition reveals that he was initially employed as an administrative assistant to Congressman Hicks. He was then transferred to the Tacoma area to serve as a district aide to Congressman Hicks. It was determined, at a later date, that a full time district aide was not needed at that time. It was agreed that O'Brien would work part time for Congressman Hicks as a district aide and he could also work for lawyers as a law clerk and investigator. Viewing the testimony in the light most favorable to O'Brien, we accept his statement that he received $500 per month from the government. He found that his work for lawyers took too much of his time. He was working 7 days a week but the congressman found him frequently unavailable for his work as a district aide. At the beginning of 1968, the election year in question, O'Brien again assumed full-time status as a district aide but he was permitted to complete certain cases he had already started. O'Brien states he received $18,600 per annum that year, but an investigation by the defendants showed that his salary was officially listed as $19,353.56. O'Brien explains this discrepancy by the higher figure being the amount usually paid for his position whereas the lower figure was paid because the congressman made a reduction when he learned of the higher salary.

There is nothing unusual about a district aide working on

a part-time or a full-time basis. Neither is it unusual for district aides of congressmen to engage in public relations work in addition to serving the legitimate requests of constituents at home. When the campaign approaches, a district aide frequently engages in some political activity. The extent of that activity is a legitimate public concern. It is not at all unusual for a political opponent to exploit any weakness he thinks he detects in the incumbent's congressional staff.

While neither the editorial nor the advertisement pointed out the plaintiff's side of the case, we find nothing more than the usual partisan analysis with respect to salary and general employment responsibilities of O'Brien. Considering the evidence in the light most favorable to O'Brien, we find mild exaggeration but we do not find substantial evidence of a defamatory falsehood.

O'Brien next contends that the reference to two damage actions filed against him for allegedly falsely representing himself to be a lawyer was defamatory and demonstrated actual malice. The damage actions were dismissed when they were brought to trial but that had not occurred when the editorial was written and the political advertisement was published. The allegations in the complaint were checked to see that the complaint had been filed against O'Brien.

[6] A newspaper has a qualified or conditional privilege to report legal proceedings provided the publication is a fair and accurate statement of the contents and is made without malice. Despite authority from other jurisdictions holding that the defense of qualified privilege does not attach to pleadings which have been filed in court but upon which no judicial action has been taken, we think the more recent trend of the law is to the contrary. We agree with those decisions which uphold the claim of privilege to report charges made in pleadings on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings. *Campbell v. New York Evening Post*, 245 N.Y. 320, 157 N.E. 153, 52 A.L.R. 1432 (1927);

American Dist. Tel. Co. v. Brink's Inc., 380 F.2d 131 (7th Cir. 1967); *Johnson v. Johnson Publishing Co.*, 271 A.2d 696 (D.C. App. 1970).

Since the subject matter contained in the publication of the two lawsuits was one of legitimate public concern the defendants were entitled to refer to the lawsuits in the editorial and advertisement unless they were motivated by "actual malice." There was no substantial evidence that defendants knew the statements in the lawsuit were false or that the defendants, on the basis of their knowledge, evidenced a reckless disregard of whether the subject of the lawsuits was false or not. The filing of the lawsuits was investigated by all of the defendants. Both Turner and Chase interviewed the plaintiffs in the lawsuits before publication of the advertisement.

Prior to the publication of the ad O'Brien warned Chase that portions of the ad were false. In his deposition O'Brien stated:

> A. I informed him that I knew about this political ad that he was proposing to run; that the statements in there were not true; *that many of them were factual as far as the lawsuits, but I thought that it was dirty politics*; that I informed him that he wasn't going to win the campaign, that he was going to have to answer to this when it was over, if he published it.

We find that although the statements made about the lawsuits were defamatory, the newspaper was accorded a conditional privilege to report the legal proceedings. As O'Brien recognized, the ad was factual to the degree that it accurately related the nature of the lawsuits as described in the news article. Turner and Chase investigated the lawsuits and interviewed the two plaintiffs in the lawsuits against O'Brien. Franich investigated the filing of the lawsuits. There was not substantial evidence of "actual malice" with reference to the statements about the lawsuits. The fact that the trial of the cases ultimately vindicated O'Brien is not material to the determination of the motivations of the defendants before the decision of the trial judge.

In his third point, O'Brien argues that the editorial im-

plies he endeavored to improperly influence the judge who continued his damage case until after the election. There was nothing wrong in O'Brien requesting such a continuance to avoid embarrassment to Congressman Hicks. Nor was there any impropriety in the judge considering such a request in the midst of a heated election campaign. There was nothing defamatory to O'Brien in the reference to the action of the judge.

The fourth point raised by O'Brien challenges the editorial and advertisement reference to the Hughes letter. This related to a letter to the editor of The Argus in a campaign 2 years before the one in question. Since O'Brien asserts that the letter was not published in The Argus, we must accept his version for the purposes of considering the summary judgment. In any event, the letter was published in an advertisement in The Tacoma News Tribune and widely circulated in the prior campaign. As the exhibits set forth in the appendixes show, the letter of Mrs. Hughes was published in the editorial and quoted in the advertisement. In that letter, Mrs. Hughes wrote:

> Mr. Robert O'Brien, who is Mr. Hicks' administrative assistant and is paid by our tax dollars, came into our store with another representative of Mr. Hicks. He proceeded to talk to me in a very rough manner concerning the removal of the Hicks sign. When I explained to him that my husband was at the present time in Washington D.C. on business concerning a government contract we have, he threatened me to this extent: He stated to me that we had a government contract, indicating that ours would be terminated. Also, he said we would be very sorry for the change of signs and that he was going to the nearest phone immediately and phone Washington D.C. and make sure that my husband would be most unwelcome in Hicks' office from this time on.

O'Brien argues that the letter was a defamatory falsehood and libelous per se. He does not deny that the encounter took place but he denies that he talked to Mrs. Hughes in a very rough manner and specifically denies that he threatened her or that Mr. Hughes had a government con-

tract. When she told O'Brien that her husband was in Washington, D.C. with reference to a government contract, he detailed to her the special service that he had performed for Mr. Hughes in connection with his attempts to obtain a contract. With reference to the replacement of the Hicks sign with a sign of Mr. Hicks' opponent in the 1966 campaign, O'Brien stated:

> I said, "That is pretty shabby treatment. So if Mr. Hughes will not call me, would you please tell him that I am going to relay this episode to our office, and I just don't believe that they are going to be quite as accommodating. He will be received and accorded everything that a constituent has coming to him, no more, no less."

Initially we recognize that the Hughes letter was defamatory. In view of the principle that all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment, we are of the opinion that the letter, read as a whole and given its ordinary meaning, presents a genuine issue of material fact as to whether it is a defamatory *falsehood*.

Since the incident described in the Hughes letter was clearly a matter of public or general concern, we next inquire—was there a genuine issue of material fact as to whether the letter was published by the defendants with "actual malice." To accomplish this, plaintiff must demonstrate by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. Reckless disregard is not to be measured by what a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendants entertained serious doubts as to the truth of the publication. *Rosenbloom v. Metromedia, supra; St. Amant v. Thompson, supra; Miller v. Argus Publishing Co., supra.*

O'Brien testified in his deposition that the Hughes letter political ad was published by only one newspaper in 1966

—The Tacoma News Tribune. O'Brien stated that when he saw the 1966 ad he telephoned William G. Robinson, general advertising manager of the newspaper, and advised him that the letter was false in that he had not threatened Mrs. Hughes and Mr. and Mrs. Hughes did not have a government contract. O'Brien said he told Mr. Robinson he would get an injunction if the paper intended to run the ad again. O'Brien claimed that Robinson left him with the impression that he need not get an injunction. The Tacoma News Tribune did not run the ad again in 1966.

Mr. Robinson did not recall the incident but acknowledged that he was the appropriate person to notify as he was the general advertising manager of the newspaper and he was involved, to a degree, in the handling of the Hughes letter ad in 1966. The ad was referred to The Tribune's legal counsel for approval. Mr. Robinson did not know the details of the investigation of the contents of the ad. It was reported to Robinson, either on the occasion of the publication or subsequently, that there had been a substantially corroborative statement by a disinterested third party as to the conversation between Mrs. Hughes and O'Brien. We do not know the source of the hearsay report to Mr. Robinson or the name of the disinterested third party. If, as claimed, the jury should find there was an express warning of falsity of the challenged statements, then as we next point out, we cannot say that plaintiff is not entitled to a further jury determination of whether the hearsay report was sufficient to provide immunity from liability for want of "actual malice."

The affidavits indicate that Mr. Robinson was general advertising manager in 1968 as well as in 1966. At the time of his affidavits in 1970 he was general manager.[2]

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[2]In his affidavit of September 1, 1970, Mr. Robinson stated that he was general advertising manager of The Tacoma News Tribune in 1966 and was involved, "at least to a degree, in the handling of the 'Hughes letter' ad by The Tribune in 1966 . . ."

In his affidavit of August 27, 1970 he stated:

That at the time of the publication of the political advertisement complained of by plaintiff herein, affiant was the general advertising

In view of the above facts and the requirement that we interpret the evidence in the light most favorable to the nonmoving party, we must conclude that there is a jury question on the issue of whether O'Brien gave specific notice to Mr. Robinson that the ad was false. It follows that the affidavits and the depositions presented a genuine issue of material fact as to whether The Tribune Publishing Company acted with "actual malice" in the publication of the Hughes letter ad in 1968. In doing so we find that there is a jury question as to whether there is clear and convincing proof that The News Tribune published the ad with a reckless disregard of whether it was true or false.

We think the ad was clearly defamatory and since the jury could find that the paper was advised that it was false, in the preceding campaign, there is a jury question as to whether they were required to investigate more fully, even under the liberal *New York Times* rule as enunciated by *Rosenbloom*. This conclusion is bolstered by the fact that this was not "hot news" which would allow less time for investigation. *See Miller v. Argus Publishing Co., supra.*

With respect to defendant Chase, O'Brien's deposition and affidavit alleges that he specifically advised Chase about 10 days before publication of the ad that the statements in the ad were not true. He requested that Chase investigate the sources of his information and check the veracity of the people he was relying upon for the information contained in the ad. O'Brien stated that Chase at first disclaimed knowledge of the ad and later stated that he knew of such an ad but didn't have anything to do with it, that the "Democrats for Chase" people were going to run it in the newspaper. O'Brien then stated that in the 1966 campaign, the opposition used "the same dodge, i.e. 'Democrats for Mahler', to hide behind libelous political ads." This was an obvious reference to the "Hughes letter" ad

manager of The Tacoma News Tribune, and it was on his authority that the said advertising copy was ultimately approved for publication.

published by The Tacoma News Tribune in 1966 over the banner of "Democrats for Mahler."

O'Brien contends that there was no organization of "Democrats for Chase" and that Turner, who signed the ad, worked very closely with Chase in all aspects of the campaign. From all of the evidence the jury could find that Chase relied upon Turner to check the statements in the ad for reliability, and that Turner was acting for and with Chase in all aspects of the publication of the ad in question. The ad was prepared by the public relations firm representing the Chase campaign committee and paid for with funds of that committee. Since Turner was, in essence, the alter ego of Chase, it could be inferred that Turner was well aware of the warning to Chase that the statements in the ad were not true. No investigation of the truth of the allegations in the Hughes letter was conducted by either Chase or Turner prior to the publication of the ad.

We conclude that applying the clear and convincing evidence test, there was a genuine issue of material fact as to whether Chase and Turner published a defamatory falsehood with a reckless disregard for whether it was true or false.

Turning now to the question of whether defendants Franich and Puyallup Publishing Company, Inc. were properly included in the summary judgment, we find an important factual difference. Franich was not warned that the Hughes letter was false. Their liability would have to be predicated upon O'Brien's argument that Franich conspired with Chase and Turner to prepare an editorial which contained a defamatory falsehood. O'Brien points to the fact that Chase and Turner met with Franich several times during the campaign and Chase furnished him newspaper clippings which he ultimately used when the editorial was prepared. O'Brien buttresses this argument with the affidavit of Edward Kirchen that he saw the advertisement in an incomplete form about 10 days before the Franich editorial was published on October 23, 1968. The Kirchen affidavit was clarified, however, by a subsequent affidavit.

In the last affidavit Kirchen explained the column entitled "The Facts" was centered in the incomplete ad. This verifies the statements of Turner and Chase that they did not know of the editorial until it appeared and then they immediately changed the proposed ad to move over "The Facts" column to the left to leave room for the editorial on the right. It is also consistent with the statements of Franich that he did not plan an editorial until shortly before it was published and did not discuss the publication of an editorial with Chase and Turner.

It is not unusual for candidates and their campaign advisers to talk to newspaper editors, furnish them press clippings and hope for a favorable editorial. There is no substantial evidence of a conspiracy.

The editorial did contain a reproduction of the Hughes letter and incorrectly stated that it was printed in several major daily newspapers. According to O'Brien it was printed in only The Tacoma News Tribune as a political ad on one occasion in the 1966 campaign. There is nothing in the evidence to show that Franich knew that his statement was an error. He was careless in investigating the facts. His sole investigation related to checking with the county clerk's office with reference to the lawsuits against O'Brien. He relied upon information he had obtained from the clippings furnished him and his own recollection of the facts. His testimony and the general tenor of the editorial reveals that he felt it was wrong to spend "around $20,000" a year of the taxpayers' money while O'Brien worked in other employment and spent time campaigning. He was apparently not aware of the fact that the other employment consisted of finishing work on cases already started. The Hughes letter was added to his main objective of exposing what he considered to be an improper expense to the taxpayers.

[7] Even though we consider all inferences in the light most favorable to the nonmoving party in a summary judgment, we cannot find clear and convincing evidence of "actual malice" in the publication of the editorial by Franich.

If we were to apply the reasonably prudent man test we could find an inference of a reckless disregard for the truth or falsity of the Franich statements. As stated in *St. Amant v. Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968), the determination of what is a reckless disregard for the truth or falsity of a statement is governed by the necessity to prove by clear and convincing evidence that defendants entertained serious doubts as to the truth or falsity of the defamatory publication. A clear warning from O'Brien that the statement was not true would have furnished an objective manifestation which would logically create serious doubts as to the truth or falsity of the statement. This would have required Franich to investigate the facts more carefully. *See Miller v. Argus Publishing Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971).

The summary judgment is affirmed as to defendants Franich and Puyallup Publishing Company. The summary judgment is reversed as to defendants Chase, Turner and The Tribune Publishing Company and the cause is remanded for trial.

PETRIE, C.J., and HOROWITZ, J., concur.

(Political Advertisement)

Who is O'Brien?

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Why is HICKS paying this man nearly $20,000 a year of your taxpayer's

MONEY??

The Facts:

From April, 1967, to December 31, 1967—Congressman Floyd Hicks paid a Tacoma resident, Robert W. O Brien, a salary of over $500 per month. During this same time, O'Brien worked in the office of a local attorney while living in Tacoma the year around.

Pierce County Herald and Puyallup Valley Tribune reprint of the October 23, 1968, front page editorial by publisher, Frank Franich—

"Maggie's Different, But . . .

Hicks' Campaign Costly To Taxpayers..."

When Seattle Times reporter William W. Prochnau, Washington D. C. Bureau Chief, wrote in the Sunday, Oct. 6 issue that the election expense law was a joke, he wasn't kidding.

Prochnau brought to light the fact that incumbent senators and congressmen often use public paid assistants for campaign work. He pointed

Who is O'Brien? If he was a "district representative," why didn't we ever see him? How could he possibly hold down a clerk's job and still be worth over $500 per month of the taxpayer's money? Why is this man being sued right now by two different parties for allegedly representing himself to be a lawyer when he is not? (Pierce County Cause Numbers 181663 and 181730).

On January 1 of this year, Congressman Hicks increased O'Brien's salary to over $1,500 per month or nearly $20,000 per year. For what? Why is this man O'Brien, who was worth over $500 per month yesterday for doing nothing, suddenly worth $20,000 of your taxpayer's money just because it's an election year?

There is something wrong about this relationship, and the voters of the Sixth District deserve answers. It's your money. He's your Representative.

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eat 6th District Congressman Floyd Hicks as one who has James Hansen on the staff and in addition has a full-time government paid "district" aide who devotes much, if not most, of his time to political campaigning."

In checking further, records show Hicks' two aides each on the government payroll of around $20,000 per year and have been left on the payroll during the campaign. More records show one of Hicks' aides, Robert O'Brien, had another job with private industry last year while still on Hicks' payroll. On top of this, he lived in Tacoma all year long.

In defeating Thor Tollefson in 1964, Hicks used as a major point of attack the fact that Tollefson's wife was on a government payroll.

Going back to Seattle Times writer Prochnau's story, he said, "Sen. Magnuson, however, has taken the unusual and laudable step of taking two of his top assistants off the government payroll this fall. The Senator's top assistant Gerald Grinstein, a $25,000 per year man, and Robert Ginther, a $18,000 aide, have been paid out of Maggie's campaign fund."

In investigating this not too popular fact that government paid aides are actually used on campaigns, additional information revealed that Hicks' aide O'Brien, while still on government payroll, was involved in private enterprise and in fact has two lawsuits pending against him for allegedly representing himself as an attorney . . . when in fact he was not.

Both of these lawsuits, which were reported in a summer issue of the Tacoma News Tribune, have been deferred by the judge (who is Hicks' replacement on the bench) until after the general election.

The same Hicks aide was the center of controversy during the 1966 election when, according to a public letter written by Mrs. I. L. Hughes of Bremerton and printed in several major daily newspapers, that he, O'Brien, threatened she and her husband when they replaced a Hicks sign from their property in front of their place of business with a sign for George Mahler.

In that letter, Mrs. Hughes wrote, "Mr. Robert O'Brien, who is Mr. Hicks' administrative assistant and is paid by our tax dollars, came into our store with another representative of Mr. Hicks. He proceeded to talk to me in a very rough manner concerning the removal of the Hicks sign. When I explained to him that my husband was at the present time in Washington, D. C. on business concerning a government contract we have, he threatened me to this extent: He stated to me that we had a government contract, indicating that ours would be terminated. Also, he said we would be very sorry for the change of signs and that he was going to the nearest phone immediately and phone Washington, D. C. and make sure that my husband would be most unwelcome in Hicks' office from this time on."

We question the use of government paid personnel for campaigning purposes. We applaud Sen. Magnuson for his integrity in this manner, but question even more strongly the undesirable methods used by Congressman Hicks.

DEMOCRATS FOR CHASE

Coordinators: Mr. and Mrs. Richard D. Turner, Mr. and Mrs. Reuben Johnston, 1019 Green Way, Tacoma

APPENDIX B

Editorial

Maggie's Different, But....

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APPENDIX C

JUDGMENTS BELOW

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IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT W. O'BRIEN,

Plaintiff

vs.

FRANK FRANICH and JANE DOE FRANICH, husband and wife; WALT TUPPER and JANE DOE TUPPER, husband and wife; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; and RICHARD D. TURNER and JANE DOE TURNER, husband and wife,

Defendants.

ROBERT W. O'BRIEN,

Plaintiff,

vs.

THE TRIBUNE PUBLISHING COMPANY, a Washington corporation; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; RICHARD D. TURNER and LINDA TURNER, husband and wife,

Defendants

NO. 1 9 0 3 5 5

MEMORANDUM OPINION GRANTING MOTION FOR SUMMARY JUDGMENT

The following opinion is written after a careful review of the affidavits

relevant depositions, briefs, and oral argument by the parties, but there are reasons why it should be released with as little delay as possible, and for that reason has not had the consideration as to form and language it ordinarily would have. The court has been favored with excellent briefs prepared by counsel well equipped to present their arguments to this court, and I regret that the qualify of this memorandum may not equal that of the written briefs. Nonetheless, because there is good reason to conclude this matter, I intend to proceed.

The court is confronted by motions of all parties for summary judgment, the granting of which may dispose of some or all issues in the case. We all would agree, I am sure, that if there are undisputed facts disclosed by the record which would require the court to deny a party any recovery, then a motion summarily dismissing the claims of that party must be granted.

We have here two law suits in which the plaintiff Robert W. O'Brien claims that he was libeled by certain publications in the Tacoma News Tribune, Puyallup Valley Tribune, and Pierce County Herald. It should not be necessary to detail those publications here. The one in the Tacoma newspaper consisted of a political advertisement during the political campaign in 1968 in which Floyd Hicks, the incumbent Congressman, was opposed by Anthony Chase, one of the defendants. This ad contained a copy of an editorial which had appeared in the Pierce County Herald and Puyallup Valley Tribune, each of whom are also defendants in one of these actions.

In oral argument, plaintiff's counsel conceded that the libeled matter referred to (1) a charge that O'Brien, while serving as an aide to Congressman Hicks, was collecting his government salary while employed either privately or while engaged

in Hicks' campaign; (2) a charge that O'Brien had engaged in the practice of law without a license; (3) a charge that O'Brien had threatened a local businessman with termination of a government contract; and, (4) a charge that O'Brien had improperly influenced a judge of this court in connection with certain litigation there pending.

Plaintiff contends that the rule announced in New York Times Company v. Sullivan, 376 U.S. 254, is not applicable, because O'Brien was not a public official or, as later cases determined, a public figure, but assuming that that rule is applicable, and I think it is for reasons hereafter stated, plaintiff must establish that the publication was made with malice, that is, it was made with knowledge that it was false or with reckless disregard for whether it was false or not.

The undisputed facts, with what may be a minor error here or there, are these:

O'Brien had worked for Hicks as his administrative assistant, later had worked only part time as a liaison officer in Hicks' district, but beginning early in 1968 had again become an aide at an annual salary between $18,000 and $20,000 per year. At this time, he was working in Pierce and Kitsap Counties, performing those many functions which an aide to a congressman is expected to perform, including the maintenance of good public relations with an eye on the coming political campaign. Hicks was challenged by Chase, and horns were locked in what appears to be a good old fashioned political contest. Chase and one of his lieutenants, Richard Turner, also a defendant, were anxious to find any flaw in Hicks' conduct of his political office which could be observed, and they seized upon O'Brien as one of Hicks' weaknesses. They fed some of the information, most if not all that appeared in the

editorial, to the editor of that paper, and he, since he was a Chase supporter, put together an editorial which had Hicks for its principal target, but which, incidentally, discredited O'Brien. Chase and Turner, as already stated, used this editorial in the political advertisement in the News Tribune.

I have no difficulty concluding that the Sullivan rule applies, not because O'Brien was a public official, but because by accepting employment from Hicks and by injecting himself into the political stream, so to speak, he took upon himself the cloak of his superior. He was no clerk or stenographer in the back office with hours from 8:00 to 5:00. His step was not more than one to the rear of the man for whom he worked, Floyd Hicks. He would hardly have been worth comment if he were not closely associated with Hicks, and I would share the opinion of Chase and his supporters who seemed to think that O'Brien was a sufficiently important public figure to

draw their fire and in that manner discredit Hicks, their real opponent.

The next question is whether or not from the record we can determine either that the defendants knew that these charges were false or that they acted with reckless disregard for their falsity. Plaintiff claims that he was libeled, because he did not receive $20,000 per year, but was worth every penny he did receive, whatever it was. I have read and reread this portion of the editorial, and the advertisement, as well as the other pertinent portions of the record, and I cannot agree with plaintiff that he was defamed nor do I think a reasonable juror would do so.

The next claim relates to the unlawful practice of law. Both the editorial and the advertisement referred to pending litigation in which it had been alleged that O'Brien represented himself as an attorney when in fact he was not. O'Brien claims that if defendants had made reasonable inquiry, they would have determined that

these allegations were untrue. But it appears to me that the defendants did make adequate inquiry. There is no dispute that the suits were pending or that these allegations were made, and I am in full agreement with the defendants in that respect. Unless counsel for the plaintiffs in those actions had violated his oath as an officer of this court, there must have been some substance to those claims. If Chase had represented that O'Brien had unlawfully practiced law, there would be some substance to O'Brien's claim. The defendants reported only the facts, namely, that there was pending litigation in which someone alleged that O'Brien had acted fraudulently. This was not a "reckless disregard" of the truth.

There is the so-called Hughes' letter which had been written two years before and published in one or more newspapers. In that letter, a Mrs. Hughes had accused O'Brien of threatening her and her husband with the loss of a government contract

because they had switched from Hicks to Mahler. In that letter, Mrs. Hughes quoted O'Brien as saying "We had a government contract." (Emphasis mine). She inferred from this remark that O'Brien could and would terminate their contract. Plaintiff contends that defendants should have verified this story. Perhaps they should have, but this was no "reckless disregard" for the truth.

Somehow, we must retain some sense of proportion. This is not the Butts case in any sense. This was a political campaign in which one of the candidates exercised some of the smear technique. One could question the worth or the advisability of attacking a Congressman's aide, but there was no fabrication, not the "big lie" that would characterize the editorial and advertisement as defamatory.

Finally, there is the claim that O'Brien was accused in the editorial of successfully

influencing one of the judges of this court. There is no such language in the editorial and not a grain of substance to plaintiff's claim. If anyone was maligned, it was Judge Hicks' successor, not the plaintiff.

I have referred to only two cases, Sullivan and Butts. This does not mean that I have not read the briefs which were submitted and it certainly does not mean that I have read all the cases cited in those briefs. I do believe that I have a grasp of the applicable legal principles and that I have sufficient knowledge to rule upon the Motion for Summary Judgment. I do rot think there is an issue of fact for determination by the trier of the fact, or perhaps I should put it another way. There is no issue as to certain facts which will defeat plaintiff's claim. The publications were not made either with knowledge of their falsity or a reckless disregard of whether they were false or not; plaintiff

at the time the publications were made certainly was a public figure, and that requires application of the rule of the Sullivan case. This is sufficient to defeat any claim that he has been defamed.

I am aware that my ruling may and should be reviewed. I am most willing to cooperate in any way that I can in signing any necessary orders so that a review will follow without delay. May I once again compliment all counsel and thank them for their courtesies at the time of argument.

DATED and SIGNED this 21st day of September, 1970.

/s/ OLUF JOHNSEN
OLUF JOHNSEN, Judge

IN THE SUPERIOR COURT OF THE
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IN AND FOR THE COUNTY OF PIERCE

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Defendants

NOS. 190355 and 193589

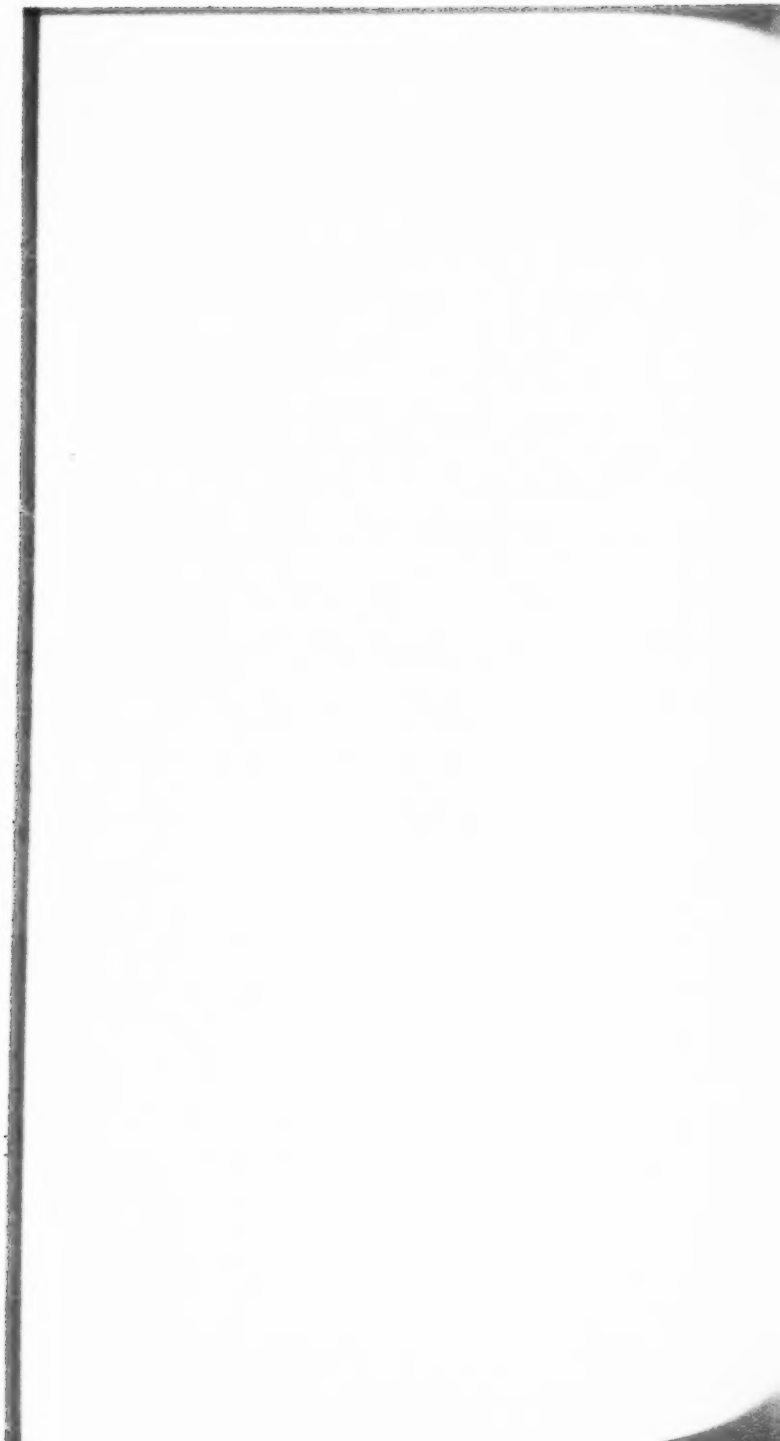
SUMMARY JUDGMENT OF DISMISSAL OF PLAINTIFF'S CLAIMS AND DEFENDANT CHASE'S CLAIM FOR PUNITIVE DAMAGES

THIS MATTER having come before the undersigned judge for hearing on Plaintiff's motion for summary judgment and the motions of defendants FRANICH, CHASE, TURNER, TRIBUNE PUBLISHING COMPANY, and TUPPER for summary judgment of dismissal and the plaintiff's motion for partial summary judgment and the court having heard oral argument herein on said motions presented by all counsel of record, said oral arguments having been heard September 8, 1970, and September 14, 1970, and the respective counsel having submitted briefs and memorandums of law in support of their respective positions on said motions, and the court having reviewed said briefs and memorandums of law and having read and reviewed all of the following depositions herein:

David Clarke Steel, Jr., taken April 21, 1970; Goodwin Chase, taken April 9, 1970; Richard D. Turner, taken April 28, 1970 Glenn Graves, taken April 21, 1970; Robert

Ketner, taken May 6, 1970; Mark Smith, taken May 6, 1970; Vernon Reynolds, taken July 31, 1970; Robert W. O'Brien, taken July 30, 1970; Frank Franich, taken April 20, 1970; Anthony G. Chase, taken July 2, 1970; William G. Robinson, Al Stephenson, Jack Pyle, John McGee Wilkins, Al Gibbs, Tom Potwin, Robert Merry and Elbert Baker, taken May 21, 1970; which depositions have been published, and the court having fully considered the depositions and the following affidavits and the attachments to each submitted in support of the respective motions:

Affidavit of Richard D. Turner in support of Summary Judgment; Affidavit of Anthony Chase in Support of Summary Judgment; Affidavit of Patrick C. Comfort in Support of Motion for Summary Judgment brought by defendants Chase and Turner; Affidavit of William G. Robinson in Support of Tribune Publishing Company's Motion for Summary Judgment; Affidavit of Paul O. Anderson in



support of Tribune Publishing Company's Motion for Summary Judgment; Affidavit of Robert W. O'Brien in Support of Motion for Partial Summary Judgment; Affidavit of Argal D. Oberquell in Support of Plaintiff's Motion for Partial Summary Judgment; Affidavit of Frank Franich on behalf of himself and Puyallup Publishing Company, Inc., a corporation, in Support of Motion for Summary Judgment; Affidavit of Ray Pekie; Affidavit of Edward F. Kirchen in opposition to Defendant's Motion for Summary Judgment; Affidavit of Robert W. O'Brien in opposition to Motion for Summary Judgment by all Defendants; affidavit of Argal D. Oberquell in opposition to Summary Judgment brought by all defendants; Affidavit of William G. Robinson in answer to affidavit of Robert W. O'Brien; Affidavit of Edeard F. Kirchen clarifying previous affidavit; Affidavit of Robert W. O'Brien in support of Motion for Summary Judgment on the counter-claim of Defendants Anthony Chase

and Karen Chase; Affidavit of Richard Wolff in opposition to Plaintiff's Motion for Summary Judgment; and the court having fully considered and read the answers to interrogatories propounded to all Defendants and the Answers to Request for Admissions propounded to the Plaintiff; and having read the briefs and memorandums of law, and heard oral argument of counsel and the court finding that there is no dispute as to any material fact relating to the principal issues herein and the court further finding that those certain publications complained of by plaintiff in his claims herein were not published by any of the defendants with knowledge of their falsity nor with reckless disregard as to whether or not said publications were true, if in fact any such publications or matters contained therein were not true, and the court further finding that plaintiff Robert W. O'Brien under the undisputed facts relating to this cause is

a public figure, and the court further finding that the first and fourteenth amendments of the United States Constitution require the dismissal of Plaintiff's claim herein, and the court having entered its memorandum opinion herein granting Defendants' motions for summary judgment and the court having entered its order granting defendants' motions for summary judgment pursuant to said memorandum opinion and the court having denied plaintiff's motion for partial summary judgment on the issues of libel per se and public official and public figure, and being fully advised in the premises, Now, Therefore, it is

ORDERED, ADJUDGED and DECREED that Plaintiff's claims herein and Cause No. 190355 in the Superior Court of Washington in and for the County of Pierce, and Cause No. 193589 in the Superior Court of the State of Washington in and for the County of Pierce be and hereby are dismissed with

prejudice and Defendants are granted their taxable costs; and it is further

ORDERED, ADJUDGED and DECREED that Plaintiff's motion for summary judgment on Defendant CHASE'S counter-claim is denied except that Defendant CHASE'S claim against Plaintiff for punitive damages be and hereby is dismissed and Defendant CHASE is allowed to amend its prayer for general damages to the sum of $1,000.00.

DONE IN OPEN COURT this 13th day of October, 1970.

/s/ Oluf Johnsen
Judge

Presented by:
/s/ Argal D. Oberquell
of OBERQUELL AND AHLF
Attorneys for Plaintiff

APPROVED AS TO FORM AND NOTICE OF PRESENTMENT WAIVED this 9th day of October, 1970.
HUTTON, SMITH & ANGELL
Attorneys for Defendant Franich
by: /s/ Robert E. Ratcliffe

GORDON, HONEYWELL, MALANCA
PETERSON & JOHNSON
Attorneys for Defendant Tacoma
News Tribune

by: /s/ Valen H. Honeywell

COMFORT, DOLACK, HANSLER & BILLETT
Attorneys for Defendants Chase
and Turner

By: /s/ Patrick C. Comfort

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

ROBERT W. O'BRIEN,

Appellant,

v.

FRANK FRANICH, et us et al,

Respondents.

ROBERT W. O'BRIEN,

Appellant

v.

THE TRIBUNE PUBLISHING COMPANY,
a Washington corporation, et al

Respondents.

NO. 381 - II
Division Two

ORDER DENYING PETITION FOR
REHEARING

The Court having considered the Petition for rehearing herein, and all of the judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and

it is hereby denied.

Dated this 25th day of July, 1972.

/s/
CHIEF JUDGE

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

ROBERT W. O'BRIEN,

Petitioner

vs.

THE TRIBUNE PUBLISHING COMPANY et al.,

Respondents

NO. 42532

ORDER DENYING PETITION FOR
REVIEW

The Court having considered the Petition for review of the decision of the Court of Appeals in this cause together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 8th day of November, 1972.

By the Court:

/s/
Chief Justice

APPENDIX D

Petition for Review from a
Decision of the Court of
Appeals Division 2 94

IN THE SUPREME COURT OF THE STATE
OF WASHINGTON

ROBERT W. O'BRIEN,

Appellant,

v.

FRANK FRANICH and JANE DOE FRANICH, husband and wife; WALT TUPPER and JANE DOE TUPPER, husband and wife; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; and RICHARD D. TURNER and JANE DOE TURNER, husband and wife,

Respondents.

ROBERT W. O'BRIEN,

Appellant,

v.

THE TRIBUNE PUBLISHING COMPANY, a Washington corporation; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; RICHARD D. TURNER and LINDA TURNER, husband and wife,

Respondents

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY CAUSE NOS.
190355 and 193589

THE HONORABLE OLUF JOHNSEN,
JUDGE

PETITION FOR REVIEW FROM A DECISION
OF THE COURT OF APPEALS DIVISION II
NO. 381 - 11

Appellant, ROBERT W. O'BRIEN, submits the following petition for review in accordance with CAROA 50.

I

JURISDICTIONAL STATEMENT

On July 25, 1972, Division II of the Court of Appeals denied appellant's petition for rehearing in this case. Said petition requested a rehearing of the opinion filed on June 15, 1972 and a copy of the petition for rehearing is attached to this petition.

The decision of the Court of Appeals conflicts with decisions of this Supreme Court, Division III of the Court of Appeals, the U.S. Federal Courts of Appeal and the U.S. Supreme Court.

A. Conflicts with the Supreme Court of Washington.

It conflicts with this court's prior decision which was based upon the majority rule throughout the United States relative to absolute privilege. The appellant

court adopted and applied the minority rule in holding that the fragmented and incomplete publishing of filed pleadings not yet acted upon by judicial review was absolutely privileged. This ruling is in conflict with this court's decision in Englemohr v. Bache, 66 Wn (2d) 103, P. 2d 346, wherein that decision clearly places this state with the overwhelming majority of the courts throughout the United States and adopts the common law rule limiting any extension of the defense of privilege.

It is likewise in conflict with Miller v. Argus Publishing Co., 79 Wn (2d) 816, 490 P. 2d 101, in holding that the derogatory statements contained in said political ad were not capable of a defamatory meaning.

B. Conflicts with Division III of the Court of Appeals.

It conflicts with the decision filed by Division III of the Court of Appeals on June 14, 1972, Walker & Assoc. v.

Jaussaud & Assoc., Vol 7, Wn App. 70 wherein the text and case authorities cited support the majority rule on qualified privilege rather than the minority view.

II

FACTS

During the summer months of 1968 a general election year, the respondents (defendants) were in constant contact with one another. Chase was a candidate for Congress in the 6th Congressional District in opposition to appellant's employer. Chase furnished newspaper clippings and other material to Franich in hopes that Franich would use the derogatory material in his weekly paper to further Chase's election hopes.

Some of the material contained a copy of a political ad published once in the Tacoma News Tribune in October, 1966, under the sponsorship of "Democrats for Mahler." That has become known as the "Hughes Letter."

In addition, Chase supplied Franich with a clipping dated July 9, 1968 from the Tacoma News Tribune and written by Richard Wolf, a reporter for the Tribune and a supporter of Chase. The July 9th story related that appellant had been sued by a Mrs. Hampton for posing as an attorney and accepting an illegal retainer fee; that a David A. Hunt had sued appellant alleging that appellant had posed as an attorney and represented Hunt in obtaining real property, but refused to return it to Hunt. The article also reported that appellant had denied the allegations contained in both actions and in addition had commenced actions against Hampton and Hunt, alleging a political conspiracy, libel and unlawful use of legal process.

Franich ignored appellant's denials and conspiracy action and published only that appellant was being sued for posing as an attorney and accepting illegal fees.

There were no other publications concerning the suits either by the Tribune or any other newspapers.

Franich made no investigation of any of the charges except he claims to have telephoned the Pierce County Clerk and asked if the Hunt and Hampton suits were filed.

Franich then prepared and published a composite of the furnished material under his editorial banner - on October 23, 1968, some three and a half months after the Tribune had published its July 9th article.

Chase and Turner were in meetings with Hampton and Hunt on two or three occasions and after hearing their stories, Turner prepared affidavits dated August 19, 1968 for their signatures. When the affidavits were returned to Turner the signatures had been torn out, admittedly by Hunt. Yet the appellate court states on P. 118:

"There was no substantial evidence that defendants knew the statements in the lawsuit were false or that defendants, on the basis of their knowledge, evidenced a reckless disregard of whether the subject of the lawsuit was false or not."

Neither Chase or Turner did any investigation of the Hunt and Hampton charges, although other individuals were referred to in the affidavits and in addition both Hunt and Hampton were represented by attorneys both before and after they made their charges.

1. The Hampton v. O'Brien case was tried first and the court found in favor of appellant O'Brien.

2. Hunt v. O'Brien case was tried next and the court found in favor of O'Brien and awarded damages to O'Brien on his cross complaint.

3. The O'Brien v. Hunt and Hampton case was tried last and the court found that Hunt and Hampton had conspired to politically harm O'Brien; that Hunt had libeled O'Brien, and that they had

unlawfully abused the legal process.

The appellate court further commented on the suits on P. 118:

> "We find that although the statements made about the lawsuits were defamatory the newspaper was accorded a conditional privilege to report the legal proceedings."

Apparently the court extended the privilege to political ads, whereas its authorities cited were referring to news reporting.

III

ISSUES OF LAW

A. The appellant court in sustaining the dismissal of Franich and his newspaper failed to apply the "hot news" doctrine as set down in the guide lines of recklessness by the Rosenbloom v. Metromedia, Inc. 91 S.C. 1811, 403, U.S. 29, 29 L. Ed (2d) 686 case, also Goldwater v. Ginzburg, 414 F. 2d 324, 339 (1969) and Miller v. Argus Publishing Co., supra, P. 831 and 832. By so doing, the appellate court grants immunity to writers for reckless publication if they

keep their deeds silent until publication.

The United States Court of Appeals in Vandenburg v. Newsweek, Inc. 441 F. 2d 378 (1971) reviews a factual situation similar to the case at bar and made this comment on P. 380:

> "Vandenburg vigorously attached the reliability of Axthem's source of information. The Supreme Court has held that actual malice may be inferred when the investigation for a story which is not "hot news" was grossly inadequate in the circumstances."
>
> Curtis Publishing Co. v. Butts, supra, 388 U.S. at 156, 87 S. Ct. 1975, 16 L. Ed. (2d) 1094.

B. The appellate court found "mild exaggeration" but not substantial evidence of a defamatory falsehold and all of the political ad, which is the subject matter of this action, excluding the "Hughes letter", was not defamatory.

The appellate court failed to apply the rules set down by this court and other jurisdictions relative to the determination of

the court and the jury. The salary portion of the ad was the less damaging. The remainder of the "Facts" column contains the libel. We refer the court to Amsbury v. Cowles Publishing Co., 76 Wn (2d) 733, 737 458 P. 2d 882.

> "(4,5) A written publication is libelous per se, actionable without proof of special damages if it tends to expose a living person to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse, Owens v. Scott Publishing Co., 46 Wn (2d) 666, 284 P. 2d 296, (1955); Spangler v. Glover, 50 Wn (2d) 473, 313 P. 2d 354 (1957); c.f. RCW 9.58.010. It is clear that the imputation of a criminal offense involving moral turpitude is libel per se in this sense. Ward v. Painter's Local 300, 41 Wn (2d) 859, 252 P. 2d 253 (1953). In determining whether a publication can be defamatory, it must be construed in the sense in which it would ordinarily be understood by its readers. Purvis v. Bremers, Inc., 54 Wn (2d) 743, 751 344 P. 2d 705 (1959)
>
> 3 Restatement Torts §614 outlines the division of functions between judge and jury in defamation actions as follows:
>
> (1) The court determines whether a communication is capable of a defamatory meaning.

"(2) The jury determines whether a communication capable of a defamatory meaning was so understood by its recipient."

The court in Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579, Cert. den. 89 S. Ct. 88, 393 U.S. 825, 21 L. Ed (2d) 96 followed what we consider to be the proper application of the above rule at P. 584:

"The defendants make a case - just barely - for the view that the article is capable of being reasonably interpreted as non-defamatory. But since the article on its face is also capable of carrying a defamatory meaning, it is for the jury to decide whether the words were in fact so understood."

C. The primary issue of law presented in this petition is the appellate court's adoption of the minority rule of qualified privilege of publishing legal proceedings before judicial action is taken.

The established facts in the record of this case are that Chase, Turner, Franich and the Tribune were all aware that there were three lawsuits filed, not just the two against O'Brien. Further, that O'Brien had

denied the allegations and counter claimed against Hunt.

For the sake of brevity we refer the court to appellant's Petition for Rehearing pages 4, 5, 6, 6, and 8 wherein case and text authorities are cited which show conclusively that just a small number of authorities support the appellate court opinion and should not be adopted in this state.

D. Conspiracy.

The appellate court reviewed the depositions of Chase, Turner and Franich and concluded that even though they admitted each participated in the planned publication of defamatory material and the Franich "Editorial" was placed into the political ad, on the same day of distribution, there was no conspiracy. This ruling does not indicate the court considered "all reasonable inferences in appellant's favor."

The question arises just how much evidence does a plaintiff have to produce? There is no countering evidence to refute the charge, just the guilty parties' explanation that Franich decided to use the material (without investigation) and Chase's statement that he considered the "Editorial" as a windfall and decided to include it in the political ad.

A review of the various depositions of Chase and Turner and all of his supporters helps to clarify this unique situation.

1. Chase first testified that the "editorial" was unexpected and he decided to reprint it some ten days after its publication - not so, it was placed in the already prepared art layout and delivered to the printer on the very day it appeared in the Puyallup Herald.

2. Chase and Franich admit that the "Editorial" was prepared from material furnished by Chase - no other source.

The conspiracy element only becomes necessary in this case to demonstrate to the jury the plotting and malicious acts performed by the actors. It further demonstrates the abuse of the maintenace of a robust and free press concept the courts have sought to encourage.

There will always be persons who will attempt to take advantage of liberties granted by our laws, but we think it behooves the courts to separate those who require restraints from those who carry the pure shield and make an honest effort.

IV

CONCLUSION

A review of this case, de novo, we respectfully submit, will show that the evidence and documents contained herein do not warrant a dismissal of Mr. Franich; that absolute privilege does not exist for the publishing of statements about the filing of pleadings under the facts of this

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case and in fact is only a qualified privilege if it exists at all; and that the reading of the political ad as a whole is just what it was intended to be, i.e., defamatory to this appellant.

Respectfully submitted,

/s/ Argal D. Oberquell
ARGAL D. OBERQUELL
of OBERQUELL AND AHLF
Attorneys for Appellant

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APPENDIX E

Petition for Rehearing and
Modification 110

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

ROBERT W. O'BRIEN,

Appellant,

vs.

FRANK FRANICH, et us et al,

Respondents.

ROBERT W. O'BRIEN,

Appellant,

vs.

THE TRIBUNE PUBLISHING COMPANY, a Washington corporation et al

Respondents.

NO. 381-11

PETITION FOR REHEARING AND MODIFICATION

COMES NOW the Appellant and respectfully requests that the Court of Appeals grant a rehearing to Appellant and modify

its opinion previously filed by the Court on June 15, 1972, in the following respects:

(1) That the Court reconsider and withdraw its ruling that statements under the "Facts Column" of the Who is O'BRIEN ad were not defamatory.

(2) That the Court reconsider and withdraw its ruling that the publishing of statements about two pending lawsuits upon which no judicial action had been held was privileged.

(3) That the Court reconsider and withdraw its ruling that the Appellant had not brought forth sufficient evidence of malice to withstand FRANICH'S Motion for Summary Judgment.

I

COURT'S IMPROPER ACCEPTANCE OF RESPONDENTS' EVIDENCE AS TO PROOF OF FACTS:

The Court did reaffirm the general rule that all factual doubts are resolved against the moving party in a Summary

Judgment proceeding. However, later on in the decision the Court accepts the testimony of CHASE, TURNER and FRANICH and completely overlooks Appellants evidence.

No mention is made of the fact that CHASE was in constant contact with FRANICH, by dropping by the Puyallup Publishing Co. office; that CHASE reported back to his supporters that he had an encounter with O'BRIEN; that O'BRIEN was aware of the proposed ad and advised CHASE as to the falsity. Isn't it a reasonable inference that CHASE also advised FRANICH?

The Court accepts CHASE and TURNERS statements that TURNER checked at the Clerks office and confirmed the filing of the two complaints yet TURNER'S deposition related that he checked with the Clerk only after the TACOMA NEWS TRIBUNE had printed a news item on July 9, 1968 of the litigation which item also included O'BRIENS denials, cross-complaint and suit against HUNT and

HAMPTON, alleging a political conspiracy, unlawful use of the legal process and libel. CHASE, TURNER and FRANICH are excused by the Court's ruling because they interviewed HUNT and HAMPTON, the same people who were later found to have committed all these improper acts.

We urge the Court to also consider the evidence submitted that HUNT removed his and HAMPTON'S signatures from the affidavits, and more importantly no further investigation was made by Respondents. It is important to remember that these affidavits with the signature's torn out were given by HUNT to TURNER prior to the publication of the FRANICH editorial on October 23, 1968 and prior to the first publication of the Who is O'BRIEN ad on October 29, 1968.

II

COURTS DETERMINATION THAT STATEMENTS UNDER "FACTS COLUMN" OF THE "WHO IS O'BRIEN" AD WERE NOT DEFAMATORY

We direct the Court to the following portions of the Facts Column of the Who is O'BRIEN ad:

> 1. "During this time, O'BRIEN worked in the office of a local attorney while living in Tacoma the year around.
> 2. Who is O'BRIEN? If he was a district representative, why didn't we ever see him? How could he possibly hold down a clerk's job and still be worth over $500.00 per month of the taxpayers money?
> 3. For what? Why is this man O'BRIEN who was worth over $500.00 per month yesterday for doing nothing, suddenly worth nearly $20,000 of your taxpapers money just because it's an election year?
> 4. There is something wrong with this relationship, etc"

In Appellants brief, P. 71, we set forth the following citations:

> "An imputation of misconduct in office, want of official integrety or fidelity to public trust, if false, is a libel as a matter of law. GAFFNEY v. SCOTT PUBLISHING CO., supra," LAMANNA v. SCOTT PUBLISHING CO., 48 Wn (2d) 683, 691, 296, P. (2d) 321 (1956)

The footnote on page 821 of MILLER v. ARGUS PUBLISHING CO. 79 Wn (2d) 816, 490, P. (2d), 101 (1971), states as follows:

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"Restatement of TORTS §614 (1938), sets forth the respective functions of Judge and Jury in these matters.

1. The Court determines whether a communication is capable of a defamatory meaning.
2. The Jury determines whether a communication capable of a defamatory meaning was so understood by its recipient,"

Appellant asks that this Court compare the above charges with the charges made against the Plaintiff in the Miller case, supra, P. 818:

"The November article asserted that plaintiff was 'a big loser' in recent Seattle City Council elections in that 'his candidates' lost despite lavish spending; suggested that the 'Miller style effort' works best where the people are bored and where Plaintiff was best able to use lavish financing and deceptive practices; and concluded that, although Plaintiffs candidates lost, he 'probably is crying all the way to the bank'."

III

COURT'S DETERMINATION THAT THE PUBLISHING OF STATEMENTS ABOUT TWO PENDING LAWSUITS UPON WHICH NO JUDICIAL ACTION HAD BEEN HELD WAS PRIVILEGED

The Court's opinion on this point is of great importance to Appellant because of the

circumstances preceeding the publication and the subsequent events which followed.

This Court in adopting the minority view of just a very few jurisdictions, relative to granting qualified privilege for publishing the mere filing of pleadings, removes and excuses the most essential segment of the actual, contrived malice of Respondents.

It is Appellants contention, supported by the activities of CHASE, TURNER, HUNT and HAMPTON, that the filing of the two law suits was a planned and deliberate act on their part. It is conceded that all deny such participation but a Jury would conclude differently. CHASE claims that he announced his candidacy the first part of May, 1968, but there is evidence and documentation that the CHASE campaign really began in November and December of 1967. CHASE returned to the State of Washington before that time for the sole purpose of opposing Hicks.

There were newspaper articles in the TACOMA NEWS TRIBUNE relating that CHASE was a possible candidate long before May, 1968, in addition, there is the period of time which relates to HUNT'S financing with a mortgage company whose personnel were directly involved with the CHASE campaign committee. This evidence was not presented nor was it deemed pertinent in opposing a Motion for Summary Judgment. However, that this is true is shown by a reading of the deposition taken of C. MARK SMITH.

This Court in its opinion on pages 10 and 11 refers to the HUNT and HAMPTON law suits being dismissed when they were brought to trial but the trials were after the editorial and political ads were published. The reader, at first glance, would interpret the foregoing as meaning the cases were dismissed without trial. The two cases went to lengthly trials with this Appellant presenting the bulk of the evidence,

exhibits and witnesses; the very same witnesses that CHASE, TURNER and FRANICH had available to them before their publications. Two different trial judges reached the same conclusion, i.e. that Appellant had not done the acts stated in the Complaints and that HUNT and HAMPTON knew this when they brought their lawsuits.

More importantly, the third action, which was apparently overlooked by this Court, but which was on file when FRANICH and TURNER checked with the Clerk, i.e. O'BRIEN v. HUNT AND HAMPTON, came to trial and the Court found that 1. HUNT and HAMPTON had conspired to politically embarrass O'BRIEN. 2. That HUNT had libeled O'BRIEN. 3. That both HUNT and HAMPTON had abused the legal process in bringing their suits in that, they knew their charges were false when they brought them.

In view of the above, we ask the Court to reconsider its ruling on qualified privi-

lege and further to follow the fuling and authorities of the Washington Supreme Court and the majority rule in this country.

We have been unable to find a Washington case bearing directly upon qualified privilege relating to the publishing of portions of pleading when the only action taken in that case is the mere filing of pleadings, but we refer the Court to the case of ENGLEMOHR v. BACHE, 66 Wn (2d) 103, 401 P. (2d), 346, wherein the Supreme Court very clearly supports the majority view on Absolute Privilege and cites authority for its findings. The language used by the Court in ENGLEMOHR, supra, in the writers opinion states that our Supreme Court has not and is not willing to adopt the minority rule - P. 104 "(1) It is the well-established general law etc". The law is equally clear that the absolute privilege will not be enlarged is emphasized by the Court at page 105:

"The policy of limiting the extensions of absolute privilege to fields where no safeguards are available to prevent an abuse of its use is supported by virtually all Courts and text authorities." (emphasis added)

Then on page 106:

"The established policy throughout the country which we consider sound, is that the absolute privilege will not be extended," (emphasis added)

Then on page 107:

"We do not wish to depart from the established policy in this country that the absolute privilege will not be extended to a non-quasi-judicial administrative proceeding" (emphasis added)

We also point out that the Court's ruling herein appears to convert a common law qualified privilege into an absolute privilege which, if so, is contrary to the mandate of ENGLEMOHR. One of the text authorities obviously referred to by the Supreme Court in ENGLEMOHR that supports this rule is Dean Prosser.

". . . . Because of the opportunity afforded for malicious public defamation and even extortion, through suits begun and promptly discontinued, most

"Courts are agreed that some official action is essential to the privilege. Thus it is the prevailing view, with some few courts to the contrary, that a pleading or a deposition filed in a case but not yet acted upon may not be reported under the claim of privilege. (cases cited) (emphasis added) PROSSER, LAW OF TORTS, HORNBOOK SERIES (4th ed, 1971) pages 831-832 CONST & PRIV - Reports of Judicial Proceedings."

A complete review of this very issue is found in 54 COLUMBIA LAW REVIEW 359 in an article written by KURT H. NADELMANN, LECTURER IN LAW, NEW YORK UNIVERSITY SCHOOL OF LAW. On page 364:

"For some forty years more it remained the established rule that the publication of pleadings or other preliminary papers to which the attention of no judicial officer had been called and upon which no judicial action had been taken, was not within the privilege accorded to the publication of judicial proceedings, absent statutory modification of the common law. Enactments were passed in many states exempting newspapers from liability for a fair report of 'judicial proceedings' but they were held to state the common law rule." (emphasis added)

Mr. Nadelmann then goes on to review the New York Court of Appeals decision in CAMPBELL v. NEW YORK EVENING POST, cited by this Court,

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continuing on page 366:

"The opinion of the Court of Appeals, written by Judge Pound, recognized that the holding was contrary to the overwhelming weight of authority elsewhere, and that the generally accepted test as to pleadings was whether they had come before a Judge and been made the subject of Judicial action."

". . . . . But it is to reports of 'Judicial proceedings' that the CIVIL PRACTICE ACT extended the privilege. The filing of a pleading may indeed be a public and official act in the course of a judicial proceeding and still not privilege a report of the pleadings' contents before it is acted upon."

On page 372:

"The new policy has not been followed by all the jurisdictions which faced the problem since the CAMPBELL case. A few years before the recent Georgia decision, the Supreme Judicial Court of Massachusetts reaffirmed its rule that the right to report courtroom proceedings does not extend to reporting accusations contained in papers filed but not yet brought before a Judge. STANFORD v. BOSTON HERALD TRAVELLER CORP., 318 Mass. 156, 61 N.E. (2d) 5 (1945), 44 MICH. L. REV. 675 (1946) said the Court:

' The defendant urges us to abandon the doctrine of the COWLEY and LUNDIN cases and to adopt instead the innovation made by a distinguished Court in CAMPBELL v. NEW YORK EVENING POST, INC...

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'The Defendant contends in substance that the doctrine of our cases does not prevent grievous harm to any individual falsely accused at some preliminary hearing and later exonerated, and that the adoption of the CAMPBELL case would result in the removal of uncertainty and danger from the business of newspapers with only a small additional risk of harm to maligned individuals. We confess that we are little moved by that argument. Public policy requires a glare of publicity upon the doings of Courts, even though individual 'itigants suffer unmerited harm, but the publication of accusations made by one party against another in pleadings is neither a legal nor a moral duty of newspapers. Enterprise in that matter ought to be at the risk of paying damages if the accusations prove false. To be safe, a newspaper has only to send its reporters to listen to hearings rather than search the files of cases not yet brought before the Court. The older doctrine of the COWLEY and LUNDIN cases still seems to us well founded in principle and without injustice in its practical operation. It is supported by the great weight of authority in other jurisdictions . . . We adhere to it." (emphasis added)

Then on page 373:

"Thus a considerable breach has been opened in the already flimsy barriers against abuse of legal process. It is for the legal profession and the public alike to see to it that this breach is closed. Neither by crime investigation commissions nor criminal law reform,

"nor any other means will it ever be possible to eradicate abuse of legal process entirely, but, in view of this, the last thing which should be permitted is any weakening of what safeguards are available.

Newspapers fulfill an indispensable part in the public supervision of the administration of Justice, and their proper performance of this function should not be impeded in any way. But has the old rule on privilege brought 'intolerable hardship' to the press? Do the newspapers need a privilege as broad as that given them by the new doctrine?"

Supporting additional documents are cited on page 373:

"In addition it is noteworthy that the American Law Institute has affirmed a preference for the old rule."

"A report of a judicial proceedings implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication therefore, of the contents of preliminary pleadings such as Complaint or Petition, Bill in Chancery, or Writ of Attachment, before any judicial action has been taken thereon, is not within the rule stated in this section. It is not necessary, however, that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that in the normal process of the proceedings, a final decision will be rendered. So too, the fact that the proceedings are ex

parte rather than inter partes is immaterial if the matter has come officially before the tribunal and action has been taken in reference thereto." RESTATEMENT TORTS §611, Comment c (1938) (emphasis added)

We respectfully remind the Court that the complained of publication was not a "newsstory" but rather a political ad and was intended to harm Appellant. The TACOMA NEWS TRIBUNE had published the news story many months prior to the political ad.

IV

SUSTAINING OF SUMMARY JUDGMENT AS REGARDS FRANICH

The Court by its opinion dismisses FRANICH from this action on the basis that Appellant did not warn him as was done with CHASE, TURNER and the TACOMA NEWS TRIBUNE. In substance, the ruling grants FRANICH absolute rather than qualified privilege. Observe the following cases where there was no warning and Summary Judgment was denied: RAGANO v. TIME, INC., 427 F (2d) 219 (1970); WASSERMAN v. TIME INC. 424 F.

(2d) 579.

This reasoning of the Court indicates that perhaps we over emphasized the warning aspects of Appellants case to parallel the case at bar with the BUTTS, MILLER and GOLDWATER cases. The test, however, is whether the subject matter to be printed is "hot news" or not. Should the Court let stand this ruling, persons of evil intent have now found a sanctuary and must only keep their malicious deeds in the dark until they are ready to publish, thereby, the victim has no notice that some defamatory material is being prepared so as to be published at the opportune moment, i.e. just before the election.

Needless to say, Appellant was not informed that CHASE was passing material to FRANICH during the summer and early fall of 1968, so how could Appellant warn of the falsity. But it would have been a simple matter for FRANICH to telephone Appellant

and state that he had some old material, one portion going back some two years, and would Appellant confirm or deny.

FRANICH is not just the author of the editorial, he is also publisher, part owner, President and guiding influence of the Puyallup Publishing Company and a political supporter of CHASE.

The Courts have long realized that the victim is not invited to the conspiracy nor is he warned in advance when publication is going to take place. MILLER v. ARGUS PUBLISHING CO., supra. It was just by chance that an acquaintance who had other matters to discuss with Appellant chanced to observe the art layout of the Who is O'BRIEN ad and inform Appellant. If that hadn't occurred, we can only presume according to this ruling, that CHASE and TURNER also would have been dismissed. It is noteworthy that this telephone call from Kirchen was from one to two weeks prior to publica-

tion of the FRANICH editorial and yet CHASE, TURNER, KETNER and STEEL all testified that no work on the Who is O'BRIEN ad was done prior to publication of the FRANICH editorial. Yet the Court appears to accept an inference most favorable to the moving party, FRANICH, that the ad was composed at the last minute when the editorial came out on October 23, 1968, yet the affidavit of Ray Pekie, presented by the Appellant, stated that the Who is O'BRIEN ad was brought to him along with the October 23, 1968 editorial on October 23, 1968 for typesetting. The only reasonable inference from all of this has to be that the publication of the FRANICH editorial was to be used in the ad and that FRANICH knew it. All reasonable inferences are to be drawn in favor of the party against whom the Motion for Summary Judgment has been made.

We again invite the Court to review the answers to interrogatories and the depo-

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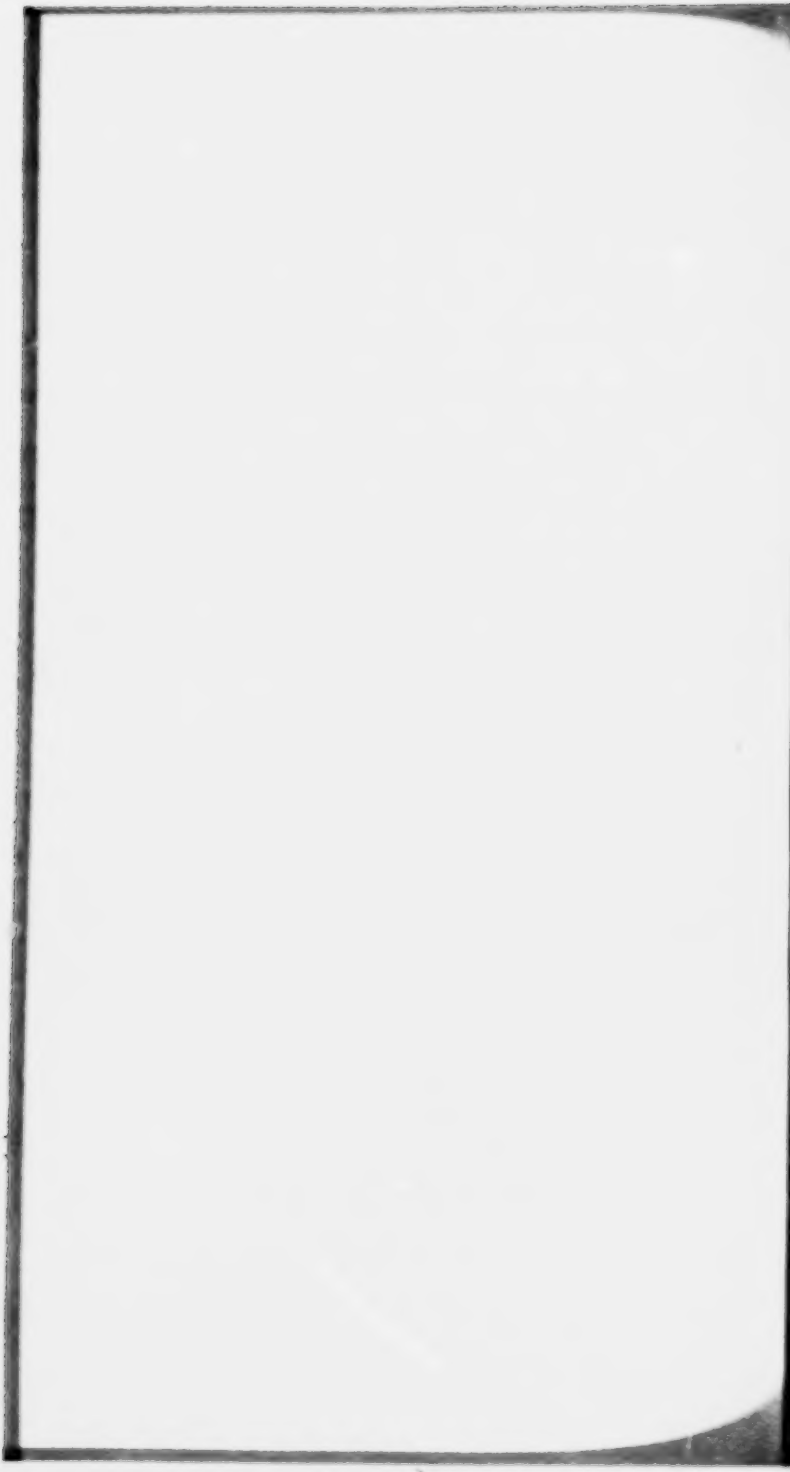
sition of FRANICH and then reconsider whether any evidence or inferences therefrom show him to be an innocent party in this conspiracy.

Yet another factor which makes the Courts ruling regarding FRANICH wrong, is the fact that FRANICH did no investigation nor checking before writing about the Hughes Letter political ad of 1966 and yet the Court excuses him for this but does not excuse CHASE, TURNER and the TACOMA NEWS TRIBUNE for doing the same thing. One can only conclude that this Court has reduced libel cases to a rule of "warning". If the rules regarding libel and slander are the same, and they are, how does one warn against slanderous utterances?

Mr. FRANICH claims he telephoned the Clerks office to verify the filing of complaints, but is that sufficient? Most Courts hold to the contrary.



"There is no doubt that evidence of negligence of motive, and of intent may be adduced for purpose of establishing by cummalation and by appropriate inferences, fact of publishers recklessness or of his knowledge of falsity." AIRLIE FOUNDATION, INC., v. EVENING STAR NEWSPAPER CO., 337 F. Supp. 421.

Should this Court feel compelled to follow the minority rule and grant privilege for the publishing of pleadings before judicial review, must it also extend the privilege in the case at bar by disregarding the limits of such privilege as stated in HURLEY v. NORTHWEST PUBLICATIONS, INC., 273 F. Supp 967 (D.C. Minn. 1967) AFF. 398 F. (2d), 346 (8th Cir 1968) on page 972:

"(6,7) The qualified privilege accorded a publisher who accurately reports legal proceedings is lost if he is motivated by malice or acts from ulterior motives designed to injure."

For what other reason did FRANICH write his editorials? For what otner reason did CHASE and TURNER make sure the law suits

were shown twice in their political ad, if not to injure Appellant.

By granting Respondents qualified privilege, the Court is clearly stating that each of them fall under the rule in that the publishing of the statements about the pending suits were:

(1) An accurate and complete or a fair abridgment of such pleadings

(2) not made solely for the purpose of causing harm to the Appellant

(3) not motivated by maiice or acts from ulterior motives designed to injure Appelland and,

(4) that the political ad is placed on an equal footing with a "news report."

We respectfully urge the Court to reconsider its ruling and withdraw or modify its opinion. That the Court found that FRANICH and his newspaper are proper parties to this action, based upon the records

contained herein, that a material issue does exist and further, that none of the Respondents be entitled to the qualified privilege rule; or at the very least that whether the qualified privilege was abused be determined by the jury as is its function in all common law qualified privilege cases of which this is one.

V

ADDITIONAL AUTHORITY ON QUALIFIED PRIVILEGE

Since preparing this Petition for Rehearing and Modification, which must be filed by June 14, 1972, Appellant on Monday June 10, 1972, received Vol. 7, Wn. App. No. 2, which contains the case of WALKER & ASSOC. v. JAUSSAUD & ASSOC., 7 Wn. App. 70 (June 8, 1972) as well as the publication of the case at bar. This case of WALKER & ASSOC. v. JAUSSAUD & ASSOC. supra, was decided by Division Three of the Court of Appeals and involves the question of qualified privilege in a libel case, albeit

a different qualified privilege than the qualified privilege of publishing reports on "judicial proceedings."

However, Appellant invites this Court to review the WALKER & ASSOC. case as its rulings are in point regarding the function and application of qualified privilege defenses and it is noteworthy that the Court in Division Three feels bound by the Restatement of Torts and cites with approval the noted authority on torts, Dean Prosser, as does this Appellant.

At page 73 of that opinion the Court states the rules regarding qualified privilege very well and in effect states what Appellant has been trying to prevail upon this Court to accept as well established rule:

> "Notwithstanding, for the sake of argument let us assume the statement was within the qualified privilege. The defense is not absolute. If the libel is patently malicious, the privilege is abused and therefore lost. PURVIS v. BREMER'S, INC.,

"supra at 755; WARD v. PAINTERS' LOCAL UNION 300, supra at 866; FAHEY v. SHAFER, supra. If the libelor has not made a good faith-reasonable investigation into the veracity of his utterance but has made same recklessly or with knowledge of its falsity, the privilege is lost. CHAMBERS v. LEISER, 43 Wash. 285, 86 P. 627 (1906); OWENS v. SCOTT PUBLISHING CO., 46 Wn. 2d 666, 284 P. 2d 296 (1955); Restatement of Torts §§ 593-97 at 241-60 (1938).

In the instant case, malice on the part of the utterer is not in question; nor is there an issue as to the truthfulness of the utterance. Thus the trial court's finding relating to motive and reasonable behavior[4] is immaterial since the trial court further found the plaintiff had uttered the statement knowing it to be false.[5]"

In effect, it is respectfully urged, the Court of Appeals in the case at bar in refusing to go into the factors of motivation and fragmentary nature of the editorial and ad not only adopted the minority rule regarding reporting on 'judicial proceedings" but in addition rejected the qualified privilege rule set forth in Restatement of Torts § 611 all of which is contrary to and in conflict with the

ruling made in WALKER & ASSOC v. JAUSSAUD & ASSOC., supra.

Another aspect of the law of libel that appears to have been overlooked by this Court's ruling in the case at bar is the rule that the Article must be read as a whole to determine if it is capable of a defamatory meaning. This Court appeared to have picked only the portions it determined were libelous and rejected the remainder. In any event the Court in WALKER & ASSOC., supra, at pages 71 and 72 recognized the correct rule and in addition correctly concluded what constitutes libel per se:

> "We agree with the trial court that the false attribution of inferior work to a professional man or association is injurious to its business, trade, or profession and is libelous or actionable per se, PURVIS v. BREMER'S, INC., 54 Wn 2d 743, 751, 344 P. 2d 705 (1959) WARD v. PAINTERS' LOCAL UNION 300 41 Wn 2d 859, 863, 252 P. 2d 253 (1953), CARROLL v. PARAMOUNT PICTURES, INC., 3 F.R.D. 95 (S.D. N.Y. 1942) even where facts

"extrinsic to the libel are necessary to discern the defamatory meaning. OWENS v. SCOTT PUBLISHING CO., 46 Wn 2d 296 (1955); PITTA v. SPOKANE CHRONICLE CO.,[2] 63 Wn 2d 763, 388 P. 2d 976 (1964). The trial court found the matters to be libelous per se and that finding is supported by substantial, although disputed, evidence, THORNDIKE v. HESPERIAN ORCHARDS, INC., 54 Wn 2d 570, 343 P. 2d 183 (1959)."

Respectfully Submitted,

/s/ Argal D. Oberquell
ARGAL D. OBERQUELL of
OBERQUELL AND AHLF
Attorneys for Appellant
O'BRIEN

APPENDIX F

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution
Amendment 14, Section 1 138

U.S. CONST. amend. XIV, §1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."